

Exhibit 28

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

COLLEEN CADAGIN, As Executrix of
the Estate of ELIZABETH DRISCOLL,
deceased,

Plaintiff,

vs.

JOHNSON & JOHNSON, JOHNSON &
JOHNSON CONSUMER COMPANIES, INC.,
IMERYS TALC AMERICA, INC., F/K/A
LUZENAC AMERICA, INC., and WALGREEN
CO.,

Defendants.

REPORT OF PROCEEDINGS
(CONDUCTED BY WAY OF ZOOM CONFERENCING.)

Before the HONORABLE CHRISTOPHER KOLKER, Circuit Judge

April 20, 2021

APPEARANCES :

MR. PAUL W. JOHNSON, MR. TED MEADOWS,
MS. LEIGH O'DELL, MR. DAVID DEARING,
MR. JOHN J. DRISCOLL & MR. JOHN BARICEVIC
Attorneys at Law
On Behalf of the Plaintiff; and,

MR. MARK HEGARTY & MR. W. JASON RANKIN
Attorneys at Law
On Behalf of the Defendants.

MARY JO JALINSKY, CSR
Official Court Reporter
C.S.R. License No. 084-003202

1 BE IT REMEMBERED AND CERTIFIED that heretofore, on
2 to-wit: April 20, 2021, being one of the regular
3 judicial days of this Court, the matter as hereinbefore
4 set forth came on for hearing before the HONORABLE
5 CHRISTOPHER KOLKER, Circuit Judge in and for the
6 Twentieth Judicial Circuit, St. Clair County, Illinois,
7 and the following was had of record, to-wit:

8 *****

9 THE COURT: As we get started, I know I have
10 said it with this crowd before, all of your briefs were
11 extremely well written. I appreciate it. Although many
12 of them were repetitive and all that, that's okay, I
13 understand that. But I appreciate well written, well
14 documented briefs.

15 I will say for the Johnson & Johnson defendants I'm
16 really starting to like how you guys had it set up at
17 the beginning with the table of contents and everything.

18 But anyway, with that being said, the first thing
19 -- it made most sense to me to go through the individual
20 experts first and then go to the motion for summary
21 judgment because of the assumptions within the motion
22 for summary judgment of whether or not the expert
23 testimony is admissible.

24 Godleski would be the first one I think, although I

1 don't really care. How I understand it when I read it
2 is that the defendant argued basically that Godleski --
3 that's G-O-D-L-E-S-K-I, it's Dr. John Godleski -- lacked
4 support that talc in tissue can cause cancer. Even if
5 he could, there's no basis to conclude that the
6 plaintiff's exposure crossed that threshold that could
7 cause cancer. He didn't rule out other possible causes.
8 All of his opinions are irrelevant, not helpful to the
9 jury.

10 He can't identify the source of talc used, and that
11 it could have been J&J but it could have been, whatever,
12 Target brand or something else. And I think each of the
13 briefs argued that every one of the plaintiff's experts
14 didn't know how much she used and really for how long,
15 and defendant assumed the only period of time that she
16 used the talc was '66 to '70, while the plaintiff said
17 no, there's other circumstantial evidence that shows she
18 used more. I could go through what the plaintiff's
19 arguments were, but if you want to add on to that,
20 Mr. Hegarty, please go ahead.

21 MR. HEGARTY: Thank you, Your Honor. It would
22 be helpful -- I would like to start with Dr. Ellen
23 Smith. She is the plaintiff's general and case specific
24 causation expert and she really lays the groundwork from

1 which we should look at all the other experts.

2 THE COURT: Well, then let me start over with
3 the notes I made from reviewing --

4 MR. HEGARTY: Okay, thank you.

5 THE COURT: -- the arguments on that one.

6 MR. HEGARTY: Thank you.

7 THE COURT: You do point out that she's a
8 gynecological oncologist that opines that perineal --
9 God, I'm not going to pronounce it right --
10 P-E-R-I-N-E-A-L talc can cause ovarian cancer and that
11 plaintiff's use of it was a substantial contributing
12 cause.

13 The defendant alleges the manner in which she uses
14 the Brandford Hill framework is not generally accepted
15 and that basically her just saying that that's what she
16 used isn't enough. That she makes a 1.2 to 1.5
17 association, which she says -- which you claim she's
18 said is both significant and nonsignificant or something
19 along those lines.

20 You also argue that the results are -- it's a
21 results oriented methodology and that the dose response
22 relationship hasn't been established between that use of
23 talc and ovarian cancer. Different studies she
24 contended showed dose responses. At least in one of

1 them you argue the study authors denied that.

2 She also claims biological plausibility -- these
3 are great words -- is satisfied but the FDA says
4 otherwise, and it goes against gravity and the flow of
5 bodily fluids.

6 And again, like I think in every one of these, that
7 she has no evidence that plaintiff was actually exposed
8 to talc but relies on Dr. Rigler. That she has no basis
9 for her opinions on fragrances and heavy metals in talc,
10 that she can't rule in talc as a cause because she takes
11 no account of the extent of the plaintiff's exposure.

12 And I think in every expert you guys argue that
13 they have failed to rule out other potential causes.

14 Is that fair?

15 MR. HEGARTY: I think that's a good summary,
16 Your Honor. And consistent with what Your Honor has
17 said previously, and given the fact that you have all
18 the briefs and exhibits, I just want to emphasize a few
19 of the key grounds, and not even all the key grounds you
20 mentioned but a few of the key grounds we think are the
21 most important to consider in deciding to -- whether to
22 exclude Dr. Smith's testimony in this case.

23 And as the -- Your Honor mentioned -- and by the
24 way, good morning. Mark Hegarty for the Johnson &

1 Johnson defendants.

2 THE COURT: Good morning, Mark.

3 MR. HEGARTY: It's important to look past Dr.
4 Smith and plaintiff's label of her general causation
5 opinion. And she is the only witness for plaintiff who
6 will be giving a general causation opinion. As you
7 know, there's general causation, can talcum powder
8 exposure cause the type of ovarian cancer that Miss
9 Driscoll had, serous carcinoma, and its specific
10 causation. Did it cause her occurrence of serous
11 carcinoma.

12 And it's important to look past the label of her
13 general causation opinion as a Bradford Hill analysis
14 and examine what she actually did to reach her opinions.
15 And we talked and Your Honor mentioned about the
16 deficiencies in her opinions as it relates to certainly
17 the Bradford Hill criteria, strength of association,
18 consistency of the studies, dose-response and biological
19 plausibility.

20 But I just want to focus for purposes of general
21 causation on her opinions as they relate to the
22 consistency factor. And as we cite on page five of our
23 reply brief, establishing the consistency factor under
24 Bradford Hill requires the different studies that

1 examine the same exposure disease relationship generally
2 yield similar results. But for her consistency
3 analysis, Dr. Smith looked at the two different types of
4 epidemiologic studies that have examined ovarian cancer
5 occurrence in talc users versus non-users to determine
6 whether the studies show an association between talcum
7 powder use and ovarian cancer. An association is shown
8 in an epidemiologic study when the results are
9 statistically significant, meaning that statistical
10 chance has been eliminated. And the two different types
11 of studies looking for an association between talcum
12 powder use and ovarian cancer are retrospective case
13 control studies which look back at talcum powder use
14 after ovarian cancer has been diagnosed and the
15 prospective cohort studies which involve healthy women
16 who have been followed forward and monitored for ovarian
17 cancer occurrence.

18 As we cite in the briefing, Dr. Smith agreed that
19 there is inconsistency between the two different types
20 of studies and also between the retrospective case
21 control studies themselves. In particular, none of the
22 forward-looking prospective studies showed an
23 association between talcum powder use and ovarian cancer
24 while only half of the retrospective case control

1 studies showed an association.

2 A properly performed Brandford Hill methodology
3 would call the consistency factor not satisfied based on
4 these study results, yet Dr. Smith's opinion is that
5 there is consistency. And she comes to that opinion by
6 cherry picking of a subset of studies that find an
7 association and ignoring the importance of statistical
8 significance by just looking at whether the overall
9 estimate is positive.

10 This is the very example of an improper results
11 driven methodology, as further demonstrated by the fact
12 that her opinions are directly contrary to the findings
13 of the National Cancer Institute and FDA, which we
14 referenced in our briefing.

15 THE COURT: Right, the FDA that does or doesn't
16 regulate cosmetics, right?

17 MR. HEGARTY: Well, Your Honor, it is the Food
18 and Drug Administration and the Food, Drug and Cosmetic
19 Act. The FDA does have regulatory authority over
20 cosmetics.

21 But this is just an example of how her methodology
22 as to general causation cannot be considered as
23 generally accepted because she doesn't apply it
24 properly.

1 Now, I want to next turn to her case specific
2 causation opinions. That is that the plaintiff, Miss
3 Driscoll's, use of talcum powder was a substantial
4 contributing factor to her ovarian cancer. And Dr.
5 Smith, likewise, failed to apply a reliable methodology
6 as to this opinion.

7 Again, it's important to look past the label of
8 differential diagnosis, as plaintiff calls what he did,
9 and examine just exactly how she came to this opinion.
10 And here I want to just focus on two aspects of her
11 opinion as to Miss Driscoll that showed that Dr. Smith
12 is really not applying any methodology at all and that
13 what she is doing has been expressly rejected by
14 Illinois courts.

15 First, Dr. Smith's approach -- and I don't
16 think it even can be called a methodology -- the case
17 specific causation was to simply rely on being told the
18 plaintiff used talcum powder. In other words, all she
19 needed to come to her causation opinion was to be told
20 that plaintiff had ovarian cancer and used talcum
21 powder. That was it.

22 This is clear from her testimony that at the time
23 she came to her opinion she said that she had no details
24 about plaintiff's talcum powder use. No generally

1 accepted methodology for case specific causation
2 requires only knowledge of a disease and an alleged
3 exposure. In fact, Dr. Smith testified that she was
4 unaware of any method under current medicine or science
5 to determine whether talc was the cause of a patient's
6 ovarian cancer. And that testimony is at pages 39 and
7 40 of her deposition. She also testified that she has
8 never done in her practice or otherwise what she is
9 doing in this case. This is at pages 50 and 51 of her
10 deposition.

11 So, Dr. Smith cannot be applying a generally
12 accepted methodology or even a methodology based on her
13 experience and observations.

14 Now, related Dr. Smith's approach to causation as
15 to plaintiff, Miss Driscoll employed a method that
16 doesn't require any finding of a harmful dose, that the
17 plaintiff was exposed to a harmful dose. Again, all Dr.
18 Smith needed to know was whether Miss Driscoll had ever
19 used talcum powder. That was enough for her to say that
20 talcum powder was a substantial contributing factor.

21 And we've cited in Johnson & Johnson defendant's
22 reply briefing Dr. Smith's showing or testimony as to
23 this flawed methodology. She was asked at her
24 deposition, Question, does it matter to you how many

1 times she -- being the plaintiff -- applied talc to her
2 genital region? Dr. Smith's answer was simply, No.
3 Really no more is needed for the court to exclude her
4 opinions, but Dr. Smith repeatedly doubled down on this
5 improper methodology as to dose. She testified that not
6 only that she need not -- that she didn't need to know
7 the details of any exposure, she could not say and
8 didn't need to say what necessary dosage was to cause
9 ovarian cancer.

10 Analogous to Dr. Smith's method is the any exposure
11 theory that has been rejected by Illinois courts in
12 cases involving lung disease allegedly from asbestos
13 exposure.

14 Now, plaintiff in her brief talked about Dr.
15 Smith's consideration of the length of time of use. But
16 I ask the court to not just look at the brief but to
17 read her testimony because she came to her opinion
18 before having any knowledge about the duration or extent
19 of product use and certainly before she received this
20 affidavit from the plaintiff's sister or the testimony
21 of plaintiff's sister about her talc use. In fact, I
22 think it's truly remarkable as to the magnitude of the
23 opinion that she came to based on so little information.

24 And one final related point that concerns this

1 entire case, plaintiff claims that asbestos, heavy
2 metals, fibrous talc and fragrance are part of Dr.
3 Smith's opinions, yet none of these substances are
4 referenced in her expert report in this case as they
5 relate to the plaintiff. She admitted she's not an
6 expert on these substances and hasn't analyzed all of
7 the literature and has no knowledge of the plaintiff's
8 asbestos exposure allegedly from talc or any exposure to
9 heavy metals, fibrous talc and fragrance. What I mean
10 is she has absolutely no information about plaintiff's
11 exposure levels to any of these substances from talc, no
12 information on exposure levels from the scientific and
13 medical literature that cause ovarian cancer or whether
14 any talcum powder that the plaintiff actually used
15 contained asbestos, heavy metals, fibrous talc and
16 fragrance, as none of the powder that she used was
17 tested. She has none of this information and hasn't
18 applied any methodology --

19 THE COURT: You expect them to go back into
20 1970 and find the exact bottles that she used as opposed
21 to just using general J&J bottles of talc that they were
22 able to obtain and test?

23 MR. HEGARTY: Well, Your Honor, there have been
24 cases where the plaintiff has had powder remaining, and

1 we do challenge the reliance on evidence, as we will
2 talk about with Dr. Rigler, that concerns the content or
3 testing of bottles that the plaintiff did not use. We
4 don't think that is sufficient evidence to prove
5 exposure to asbestos, heavy metals, fibrous talc by the
6 plaintiff in this case.

7 But that aside, she should -- Dr. Smith should not
8 be allowed to testify about exposures to substances when
9 she has no information about what harmful levels of
10 those substances are or that the plaintiff was exposed
11 to these such harmful levels.

12 And what plaintiff says is that all of these
13 substances are constituents of talcum powder that
14 contributed to being a carcinogen, but that's a lawyer
15 litigation opinion and not one that's a result of a
16 generally accepted methodology. In other words, Dr.
17 Smith has not shown through any methodology that all of
18 these substances have a carcinogenic effect for ovarian
19 cancer when they are in talc or there is any showing at
20 all what levels are in talc.

21 What Dr. Smith and plaintiff says is that because
22 studies of this material at specific exposure levels
23 show some type of carcinogenicity, the mere presence of
24 this material in talc causes cancer, but there is no

1 scientific or medical data or any type of data that has
2 shown this. It is, again, just a no dose or any
3 exposure kind of opinion.

4 In the end, her methodology doesn't require a
5 review of medical records, doesn't require any testing,
6 doesn't require any information or study about exposure
7 levels that can cause harm, doesn't require any
8 information about the plaintiff's exposure levels, it
9 doesn't require any analysis of other risk factors or
10 the occurrence of the disease without risk. All she
11 requires is that the plaintiff used talc to say that it
12 was a substantially contributing factor to the ovarian
13 cancer. That's not a generally accepted methodology.

14 And for these reasons and the other reasons that we
15 set out in our briefing, we ask the court to exclude Dr.
16 Smith's opinions, including any opinions about asbestos,
17 fibrous talc, heavy metals and fragrance.

18 Thank you, Your Honor.

19 THE COURT: Plaintiff argued in response that,
20 first of all, the expert doesn't need to disprove every
21 possible cause, which I believe is a correct recitation
22 of Illinois law. And they don't need to rule out every
23 possible potential -- you know, if aliens could have
24 landed on planet earth and inserted ovarian cancer. We

1 don't need experts to spend time researching that and
2 ruling that out. Of course, that's the way it is. It
3 can be what's a substantial factor is pointed out
4 repeatedly I think in each of plaintiff's responsive
5 briefs and also I would argue a little bit of common
6 sense.

7 Plaintiff says that Dr. Smith's methodology is
8 reliable and qualified, that the association is met by
9 the 20 to 50 percent increased risk. Although, as I
10 read it, it looks like there may even be some that shows
11 70 percent increased risk and there's no specific
12 threshold that really needs to be met anyway, which
13 makes sense to me.

14 Dr. Smith opines on the biologic plausibility that
15 it's reliable and that there's evidence in the
16 literature and studies that talc reaches ovaries either
17 by migration or inhalation.

18 Of course, she relies on Rigler and Longo to
19 support what talc contains, but that all of these are
20 questions potentially for the jury to hear really and
21 not for a Frye hearing. The case in defendant's brief
22 that they kind of leaned on initially was the Carl case
23 that then got reversed on the New Jersey reviewing
24 court.

1 Mr. Johnson, you're the lead or Mr. Meadows, do you
2 guys have anything to add to any of that?

3 MR. JOHNSON: Well, before Leigh O'Dell speaks
4 up on behalf of Dr. Smith's testimony --

5 THE COURT: I'm sorry, Miss O'Dell, I didn't
6 mean to leave you out of it.

7 MS. O'DELL: No problem, Judge.

8 MR. JOHNSON: I'm sorry, but just before she
9 gets into the weeds of that testimony, let me just point
10 out that what Mr. Hegarty just said -- and Your Honor is
11 well aware of the Illinois case law -- as to how well
12 accepted methodologies are applied in a given
13 circumstance is a matter of cross examination --

14 THE COURT: Right.

15 MR. JOHNSON: -- contrary evidence --

16 THE COURT: Right.

17 MR. JOHNSON: -- at trial. And that's the --
18 that's the point. I didn't hear anything challenging
19 that differential diagnosis is a novel theory under
20 Illinois law.

21 THE COURT: Right.

22 MR. HEGARTY: My response to that, Your Honor,
23 is that what she called a differential diagnosis is not
24 the differential diagnosis method.

1 THE COURT: That's what you guys can argue.

2 MR. HEGARTY: Well, I think that that goes to
3 the admissibility of her testimony, Rule 702. She's not
4 applying a reliable methodology. She's calling what
5 she's doing a differential diagnosis, but it's not a
6 differential diagnosis methodology when all you need to
7 know is an exposure to conclude that it was a
8 substantial contributing factor.

9 THE COURT: Miss O'Dell, anything else?

10 MS. O'DELL: I would only say, Your Honor, that
11 the differential diagnosis she considered all the
12 medical history of Miss Driscoll. She considered the
13 evidence of her usage. It wasn't just that she used in
14 a vacuum. She considered her years of usage in light of
15 the epidemiology which shows an increased risk over
16 years of usage. And she considered all of her other
17 medical factors that might contribute or not contribute
18 to her ovarian cancer. She ruled all those in. She
19 ruled out the ones that were not relevant and she came
20 to the conclusion that talcum powder which shows a
21 consistent statistically significant increased risk of
22 ovarian cancer was a substantial contributing cause of
23 her injury.

24 And so Dr. Smith is eminently qualified. She

1 practiced GYN oncology for more than 28 years, and her
2 testimony would assist the jury in understanding the
3 evidence in this case. And so we think the motion
4 should be denied.

5 THE COURT: Yeah, and is this the one also
6 where the defendant argued that not having babies or
7 having long menstrual cycles might be in cause of
8 cancer?

9 MR. HEGARTY: I'm not sure that was exactly the
10 argument, Your Honor. There are factors that relate to
11 increased risk or decreased risk based on (Inaudible.),
12 number of pregnancies and the other factors we've cited.
13 I'm not saying that those are going to be argued
14 necessarily in this case but the point --

15 THE COURT: Not if we have women on the jury
16 probably.

17 MR. HEGARTY: Well, the point was being made,
18 Your Honor, that I do think under the methodology she
19 purported to apply, she contended she was ruling in and
20 ruling out all these other factors where she did not.
21 And again, I go back to the fact that I don't think
22 there's any authority under Illinois law that says that
23 if you are in the vicinity of what is alleged to be a
24 carcinogen, that is all you need to know in order to

1 conclude that being in the vicinity is a substantial
2 contributing factor to causing disease. And that's what
3 Dr. Smith did.

4 THE COURT: I don't have any trouble with her
5 methodology, the way she applied the framework. Her
6 methodology, when I reviewed it, is reliable. She is
7 certainly qualified. There's enough strength in
8 association, increased risk. I also point out, as
9 Mr. Johnson did preliminarily, that she's been accepted
10 in all these other courts and she's met all the
11 qualifications.

12 The motion to exclude Dr. Smith is denied.

13 Next one. Which do you want to go to next,
14 Mr. Hegarty?

15 MR. HEGARTY: Your Honor, I'll go back to where
16 Your Honor started and Dr. Godleski, if that's okay.

17 THE COURT: Okay, Dr. Godleski already stated
18 when I did my little summary about what I summarized of
19 what the defendant argued. Do you have anything briefly
20 to add, Mr. Hegarty?

21 MR. HEGARTY: Yeah, I think that I would like
22 to elaborate on a couple of points that are set out in
23 our motion. And again, I think it's helpful to talk
24 about these things because assuming the court -- or if

1 the court denies our motion for summary judgement, then
2 we're going to be talking about these a lot.

3 THE COURT: Right.

4 MR. HEGARTY: And Dr. Godleski's opinions in
5 this case concern his finding of 16 talc particles
6 in the reproductive tract tissue of the plaintiff. And
7 this motion doesn't contest, again just for purposes of
8 this motion, the methodology he used to claim to find
9 those 16 particles. We're going to take issue with that
10 methodology, but not for purposes of this motion.

11 This motion is about what Dr. Godleski and
12 plaintiff proposes to do with this finding of 16
13 particles. What we ask the court to exclude him from
14 testifying about this finding, to exclude him from
15 saying that there's a substantial amount of talc in the
16 plaintiff's tissues because of this finding, and most
17 importantly, to exclude his opinion that the 16
18 particles is -- and I'm quoting from this report --
19 contributory evidence for the link between the presence
20 of talc and the development of ovarian cancer.

21 And I want to focus on that opinion to begin with,
22 because Dr. Godleski has no methodology to allow him to
23 link the finding of these particles to ovarian cancer
24 causation. What I mean is that there's no scientific or

1 medical literature that links the finding of talc
2 particles in tissue to ovarian cancer risk or causation.

3 The studies that have been done and are cited by
4 plaintiff, some of which are authored by Dr. Godleski,
5 report finding talc particles in the tissue of women who
6 have used talc, but the necessary next step of looking
7 for an association or correlation between that finding
8 and ovarian cancer risk or causation have not been done
9 by Dr. Godleski or anyone else.

10 And just a little bit more about the studies that
11 plaintiff cites in her brief, as I mentioned, they
12 involve taking the finding of talc in tissue. They
13 don't involve taking the finding of talc in tissue to
14 the next step in showing that that finding has anything
15 to do with ovarian cancer risk or causation.

16 They look at in many cases tissue from plaintiffs
17 who have filed lawsuits and claim talc use and report
18 finding talc like -- while at the same time find talc in
19 the tissues of women who did not use talc and cite other
20 studies that likewise found the same. So these studies
21 claim to have found talc in tissues but have not done
22 anything, employed no methodology to show that you can
23 draw any causation conclusions from it.

24 So we have we have here is a series of anecdotal

1 reports that have not been shown to have clinical
2 significance. In other words, there is no scientific or
3 medical nexus or connection between talc particles in
4 tissue and ovarian cancer causation.

5 Also important is that there's no scientific or
6 medical literature showing what dose or volume of talc
7 particles in tissue is sufficient to cause ovarian
8 cancer. And certainly Dr. Godleski cannot show that
9 plaintiff reached a dose or volume in her tissues that
10 caused ovarian cancer. Without such a scientific and
11 medically established nexus, Dr. Godleski has no grounds
12 to offer his opinion that the finding of these particles
13 is contributory evidence of a causal link between
14 plaintiff's talc use and her ovarian cancer, and merely
15 showing the presence of an exposure or the existence of
16 an exposure is insufficient to reach any type of causal
17 opinion, which is what we just talked about, if that is
18 exactly what Dr. Godleski proposes to do.

19 Now, plaintiff tries to distinguish Dr. Godleski's
20 opinion that talc particles are contributory evidence of
21 a causal link from actual causation opinion that could
22 only be done through a full causation analysis, which
23 plaintiffs admit Dr. Godleski did not do. In fact,
24 plaintiff calls his opinion only a partial causation

1 opinion. Now, we're not aware of any different standard
2 applicable to a partial causation opinion. There is no
3 distinction. I don't think the jury would be able to
4 parse his words from the substantial contributing factor
5 standard. The bottom line is that he's offering a
6 causation opinion without following a generally
7 recognized methodology to get there.

8 And I want to go back to where we started and
9 talked about with Dr. Smith. We talked about Brandford
10 Hill. Dr. Godleski did not apply this methodology. We
11 talked about differential diagnosis. He didn't apply
12 that methodology. In reality, there's no causation
13 methodology behind it, and it's the very definition of
14 ipse dixit, that is it's an assertion made without
15 proof.

16 So what we have here is testimony from Dr. Godleski
17 about talc particles he found that doesn't assist the
18 trier of fact to understand the evidence or to determine
19 a fact in issue because they have no scientific or
20 medical meaning.

21 And along these same lines, Dr. Godleski's finding
22 of 16 particles is not evidence of plaintiff's use of
23 Johnson's baby powder or that talc did reach the
24 reproductive tract from powder use, which is what the

1 plaintiff contends. And this is not a factual finding
2 by Dr. Godleski but an expert opinion that the court
3 needs to assess under the general acceptance standard.
4 But Dr. Godleski testified that he cannot identify these
5 particles that's specific to Johnson's baby powder or
6 any source. He cannot identify when they came to be in
7 tissue and there's absolutely nothing unique in this
8 finding to talc users, as this finding had been reported
9 in users and non-users.

10 What is missing under this methodology are studies
11 showing this type of finding is actually evidence of
12 talcum powder use. It is that studies showing that it's
13 a marker of talcum powder use. So again, there's
14 nothing about this testimony that will aid the trier of
15 fact in making its decision in this case.

16 And plaintiff also argues that the finding of 16
17 particles demonstrates the frequency, regularity and
18 proximity of Miss Driscoll's exposure to talcum powder
19 products.

20 First of all, this is an asbestos concept that has
21 not been adopted in Illinois as to talcum powder
22 exposure.

23 Second, finding 16 particles of talc isn't evidence
24 of the frequency, regularity or proximity of Miss

1 Driscoll's use of talcum powder because Dr. Godleski
2 applies no methodology to correlate finding 16, or 12,
3 or 20 talc particles to the frequency, regularity and
4 proximity of talc users. There just aren't any studies
5 that do this, and no generally accepted methodology can
6 do there.

7 And finally, Dr. Godleski's extrapolation of his
8 opinion where he goes from 16 talc particles to
9 thousands of talc particles in tissue is not the product
10 of a generally accepted methodology. It's not because
11 he relies on studies doing this involving asbestos and
12 lung tissue where these studies have not been done
13 involving talc and reproductive tract tissues.

14 In the end he's doing the same thing that he's
15 doing with all his opinions, he jumps to the end of the
16 race without putting in the work to get there. Studies
17 can be done looking at talc particles in tissue and
18 ovarian cancer risks. Studies can be done looking at
19 talc particles in reproductive tissue in trying to see
20 if I can extrapolate that to the entirety of the tissue,
21 but those have not been done, and Dr. Godleski has not
22 done them. And without that support, there's no
23 scientific basis for his opinion.

24 Now, as the court will read and you probably heard

1 other courts have allowed Dr. Godleski to testify to
2 these types of opinions. We disagree with those courts,
3 but no court in Illinois has considered Dr. Godleski's
4 opinion and certainly this court hasn't, as to Miss
5 Driscoll. We're here to try Miss Driscoll's case and
6 determine what evidence is going to be admitted here.
7 And we know the court will look at Dr. Godleski's
8 opinions and the legal authorities from a clean slate.
9 And we ask that based on the briefing, the arguments in
10 our briefing, the arguments here today, that the court
11 exclude Dr. Godleski's opinions in this case as they
12 relate this finding of 16 talc particles.

13 THE COURT: As to the plaintiff's response,
14 first they note that Dr. Godleski -- oh, I'm getting
15 feedback now from somebody. I'm going to mute
16 Mr. Baricevic since he's the closest. It's first off
17 that he was Harvard -- he's been a professor at Harvard,
18 now is a profession emeritus at Harvard and actually
19 taught, if I'm correct, at the Harvard teaching hospital
20 for awhile and some other things -- that his opinions
21 and methodologies aren't new or novel, they are based on
22 longstanding principles of pathology and microscopy.
23 That if there's a link or not, that's an issue for the
24 jury to hear. That his testimony has been found

1 reliable they say every single time. Of all the
2 particles found, talc was the only carcinogen. That the
3 evidence of exposure is enough, and that the -- really
4 the point of it is is that the presence of talc is
5 contributory evidence for the causal link, as
6 Mr. Hegarty also pointed out. And that Dr. Godleski
7 doesn't need to prove whether or not she used the talc
8 because we have other people who are going to testify as
9 to her use.

10 With that being said, I think -- do you guys have
11 other stuff to add on the plaintiff's side?

12 MR. DEARING: Good morning, Your Honor, David
13 Dearing. I'll handle this particular motion, and I have
14 a beautiful six-page outline I'm going to skip most of
15 now. I also have a PowerPoint presentation and I'll
16 probably go back on that, as well.

17 THE COURT: By way, I have never seen so many
18 footnotes in briefs in my life.

19 MR. DEARING: We have created so many of them
20 we feel like we're getting good at it, Your Honor. And
21 on that note, this is not a new brief and not a new
22 argument from the defendant.

23 THE COURT: I gathered that.

24 MR. DEARING: It survived Daubert hearings and

1 Frye hearings. This will be the 11 trial, hopefully,
2 where his opinion has been admitted, his exact same
3 opinions, unlike maybe some of the other experts where
4 specific causation sometimes lends itself to nuanced
5 opinions. These are the exact same opinions that are
6 being offered in this case that Dr. Godleski has offered
7 in the ten previous trials, with the possible exception
8 that Miss Driscoll frankly had more talc in her tissue
9 than most of the other plaintiffs have had.

10 With that aside, the defendants are arguing now
11 what they've done in every case. What they're doing is
12 they try to conflate this contributory negligence
13 opinion of Dr. Godleski into something much larger than
14 it is so that they can try to get it excluded. But the
15 fact of the matter is Dr. Godleski found a significant
16 amount of talc in the very organ of origin of the
17 cancer, in her right ovary and right fallopian tube
18 where these cancers started. The defendant's own
19 experts, own pathologists agree this is where the cancer
20 likely started. So it's more than just finding talc in
21 tissue. There's a proximity nexus between where the
22 talc was and where the cancer started.

23 The other thing Dr. Godleski says, which Mr.
24 Hegarty left out, was that Dr. Godleski also observed

1 evidence of inflammation associated with the particles
2 he saw. That's very important because that's not just
3 showing talc next to cancer, that's showing talc causing
4 a reaction from the tissue. And our studies and our
5 experts will testify that it's this chronic inflammatory
6 action that ultimately leads to the development of
7 cancer. So the talc particles aren't just sitting there
8 and tissues reacting to them.

9 I will forego my description of Dr. Godleski's
10 methodology because I believe it's well establish in his
11 report, which is also in evidence. You know, he teaches
12 this technique, like you said, at Harvard. And this
13 technique is taught all over the world, not just by Dr.
14 Godleski. It's in text books. But he's also actually
15 published these exact findings. They're consistent
16 (Distorted audio.) with his statement.

17 So what I would like to do is sort of skip down to
18 this actual causation statement that the defendants seem
19 to take exception to. And I'm going to ask Katie, if
20 she would, to at least pull up one slide, and that's
21 slide 12. And this is the statement that's right in his
22 report and it's essentially the statement that's been
23 offered in every trial. Based on the findings in this
24 case, it can be stated to a reasonable degree of medical

1 certainty that the talc found in this case confirms the
2 patient's exposure and is contributory evidence for a
3 causal link between the presence of talc and the
4 development of this patient's ovarian cancer.

5 This statement is not intended to be a full
6 statement of causation, and it never had been --

7 THE COURT: I understand.

8 MR. DEARING: -- Despite the fact that
9 defendants want to characterize it that way. It's one
10 piece of this causation puzzle. Katie, would you put up
11 slide 13. There are several disciplines of science that
12 go in to establish cancer causation. You know, the
13 causation puzzle includes testimony of cell studies, and
14 inflammation studies, and migration studies, and
15 epidemiology studies, and the metaanalysis, and the pool
16 studies.

17 Katie, can you just run through 14, 15, 16 and 17
18 as I talk about them. These are the cell studies that
19 are considered in the causation analysis. And there are
20 inflammation studies -- the next slide -- and there are
21 migration studies, and there are epidemiology studies,
22 many epidemiology studies that we've already discussed
23 that show a statistically significant increased risk of
24 ovarian cancer in women that use talc in the genital

1 area.

2 There are several metaanalysis and pool studies,
3 and our experts will testify that these are the most
4 robust of epidemiology studies because they take into
5 account the most cases and they are blended in a way
6 that's statistically significant.

7 And then, of course, Dr. Godleski himself has
8 actually published this very opinion in at least two
9 studies -- slide 11. This is one of the studies. The
10 second quote, It documents exposure by demonstrating the
11 presence of talc in these tissues and provides evidence
12 and support of the role of talc in the epidemiological
13 association with ovarian cancer in case controlled
14 studies.

15 These opinions went through a vigorous peer
16 reviewed process by other scientists. And it's not just
17 Dr. Godleski's opinions, as you can see, there's eight
18 or nine scientists that contributed to this study.

19 And then slide 18. Here's another study on
20 migration specifically, but he also notes as one of the
21 contributing authors, Given the ongoing concerns
22 regarding talc -- he's talking about the ovarian cancer
23 concerns -- particularly with regard to its
24 epidemiological association with ovarian cancer, these

1 findings are important and offer new insight into the
2 biologic potential of talc.

3 That's exactly what he's talking about. He's
4 talking about how finding talc in tissue is important
5 but when there are other studies, other science that
6 supports the nexus, the causal nexus between talc and
7 ovarian cancer, finding talc in tissues where cancer
8 originated takes on an even greater importance.

9 So, Judge, I think I'll leave it there.

10 Actually, will you pull up slide 19?

11 THE COURT: Famous lawyer last words,
12 Mr. Dearing. I'll leave it there, one last word.

13 MR. DEARING: The very first trial this was
14 brought up in was in Federal Court, and our Federal
15 Court Judge acknowledged that Dr. Godleski's opinions
16 were admissible because he was qualified, the opinion
17 was relevant and stems from reliable methodologies.

18 And then the last side, slide 20, is a list of the
19 trials where his opinions have been admitted.

20 The bottom line is the Frye standard is a much
21 lower bar than Daubert, I believe, and clearly he meets
22 the Frye standard for admissibility of his opinions, and
23 that includes this partial causation opinion that he
24 wants to add.

1 You know, he's not saying it's a complete causation
2 opinion. What he's doing is he's adding one piece of
3 that causation puzzle, and that is, you know, the
4 presence of talc in the ovarian tissue where the cancer
5 originated contributes to the causation opinion.

6 THE COURT: Last word briefly, Mr. Hegarty?

7 MR. HEGARTY: Sure, yeah, thank you, Your
8 Honor. Your Honor mentioned qualifications, his use of
9 scanning electron microscopy. We're not challenging
10 that for purposes of this motion. There may be
11 questions directed at that at some point but not for
12 purposes of today.

13 Counsel referenced the epidemiologic studies, the
14 general causation. I'm not here to argue that for the
15 purpose of Dr. Godleski. He doesn't argue it himself
16 since he did not do a causation analysis, and that's not
17 the basis of our motion. Our motion is that he doesn't
18 have a generally accepted methodology.

19 To go from a finding of particles to a partial or
20 causation opinion, because he's done nothing to do that.
21 All he does it call it that, and that's not generally
22 accepted to just say based on my whatever analysis or
23 opinion, that that is evidence of a causal association.
24 There has to be studies that show that there's a

1 relationship between the finding of talc particles and
2 ovarian cancer risk or causation. And those studies
3 have not been done, including by Dr. Godleski.

4 THE COURT: With all that of that said,
5 certainly it looks like Dr. Godleski is qualified. It
6 appears to me his methodology and the way he used it has
7 all been generally accepted. He's been accepted in
8 multiple courts. So, as plaintiff pointed out early on,
9 I'm not even sure how much of a, quote, Frye hearing we
10 need. Motion to exclude Dr. Godleski is denied.

11 Who do you want to take up next, Mr. Hegarty?

12 MR. HEGARTY: I'd like to take up Dr. Plunkett
13 next, Your Honor.

14 THE COURT: And Dr. Plunkett, as I recall -- or
15 in my outline, defendant argued that the plaintiff --
16 these are some -- some sort of variant of this seems to
17 run through for each of the plaintiff's experts, at
18 least this argument by defendant that Dr. Plunkett
19 didn't reliably perform the risk assessment analysis.
20 She's the one the defendant argued she previously
21 offered a general causation opinion but then backed away
22 from it and now contends that she didn't perform a
23 general causation analysis.

24 Her opinions treat exposure to trace amounts of

1 talc the same as long term to raw asbestos. Her any
2 exposure argument increases -- she has an argument any
3 exposure increases risk, that that lacks scientific
4 basis. That fibrous talc opinion should be out because
5 there's no evidence that plaintiff was exposed to that,
6 and that there's no link to ovarian, and that Dr.
7 Plunkett's also the one the defendant argues there's no
8 link about the heavy metals linking to ovarian cancer.
9 That she doesn't quantify the amount of talc, which
10 also, again, runs through for every one of the experts.

11 Defendant pointed out that chromium and nickel may
12 also be found in food. There's no science linking
13 fragrances to ovarian cancer. Doctor Plunkett fails to
14 consider the extent of plaintiff's exposure. And then
15 Dr. Plunkett -- and that's P-L-U-N-K-E-T-T, Mary Jo, I'm
16 sorry -- that her opinions about the business practices
17 should be excluded, and the opinion that defendant
18 downplayed the risk of talc in not telling consumers.
19 They say she's never been in product safety. That
20 there's no reliable methodology. She was never a part
21 of an NTP hearing. She shouldn't testify on legal and
22 regulatory matters because she has no legal or
23 regulatory training. And her testimony about the state
24 of mind or FDA's state of mind is improper.

1 I will go ahead and say the plaintiff's
2 arguments -- because Plunkett was probably, for me, the
3 most interesting one for a couple reasons -- but that
4 Dr. Plunkett's methods are not new and novel. She's
5 been allowed to testify on these things in multiple
6 courts. That she was a consultant for pharmaceutical
7 companies in the areas of pharmacology, toxicology and
8 regulatory standards and has helped companies with FDA
9 regulations, requirements and has advised companies if
10 warnings are indeed appropriate or not, and has helped
11 again through FDA sort of issues. That her use of human
12 health risk assessment and her opinions is generally
13 accepted.

14 Plaintiff argues it's used by all U.S. agencies.
15 She used weight of the evidence assessment. She ID'd
16 hazards of the J&J powder exposure and defining the dose
17 response relationships between talc and risk of adverse
18 side effects. And her opinions on labeling are not
19 speculation nor inference but rather opinions to show
20 how Johnson & Johnson's actions differ from what a,
21 quote, reasonable drug manufacturer, unquote, would do.

22 So, again Mr. Hegarty, are you going to carry all
23 the weight for this one too?

24 MR. HEGARTY: I am, Your Honor, if that's all

1 right.

2 THE COURT: It's fine with me. Who's on the
3 other side for this one since they're all ganging up on
4 you?

5 MR. MEADOWS: I'm tagging in, Judge.

6 THE COURT: All right. So, Mr. Hegarty, please
7 go ahead.

8 MR. HEGARTY: Thank you, Your Honor. Again,
9 Mark Hegarty for the Johnson & Johnson defendants.

10 As the court may have surmised from the briefing,
11 Dr. Plunkett is essentially a professional witness who
12 testifies exclusively for plaintiffs in cases like this.
13 She is a witness the plaintiffs intend to use as a
14 platform to talk about internal documents and other
15 concepts that the jury is more than capable of handling
16 itself.

17 And as I did with the other experts, I'm just going
18 to focus on some of the key aspects of the reasons that
19 her opinions should be excluded and not cover all the
20 grounds the court has read in analyzing the briefing.

21 And I want to begin by talking about her flawed
22 methodology as it relates to asbestos, heavy metals,
23 so-called fibrous talc and fragrance. And first, as to
24 asbestos, as we discussed, asbestos exposure is

1 irrelevant in this case because plaintiff's case
2 specific expert, Dr. Smith, doesn't have any evidence
3 about asbestos exposure by the plaintiff.

4 THE COURT: Can you slow down a little bit?

5 MR. HEGARTY: Sure.

6 THE COURT: My court reporter's -- our
7 courtroom is the only one where the big screen in our
8 courtroom doesn't sync right, so it's like those 1970's
9 cartoons -- was that Johnny Sokko -- where the mouth
10 moves at a different pace than the words that are trying
11 to be -- and it drives her bananas. So she's trying to
12 keep up, but if we could slow down our cadence, it would
13 help her out a lot.

14 MR. HEGARTY: Sure, yeah, I was an Ultra-Man
15 fan in the 1970's.

16 THE COURT: Right, I forgot all about that one.

17 MR. HEGARTY: And I understand that, yeah. And
18 the giant robot, right? Johnny Sokko.

19 THE COURT: Right.

20 MR. HEGARTY: You and I are the same vintage.
21 We could only get -- when I was growing up we could only
22 get four channels.

23 THE COURT: Right. I think we only had three
24 so you were lucky.

1 MR. HEGARTY: The antenna was a little bit more
2 powerful, but I will definitely slow down. Starting
3 over, I guess, a little bit, as we discussed, asbestos
4 exposure is irrelevant in this case because plaintiff
5 doesn't have any evidence about exposure to asbestos by
6 the plaintiff. And I want to reference back to Dr.
7 Godleski who didn't find any asbestos or fibrous talc in
8 the plaintiff's tissue. And there's no information from
9 Dr. Plunkett or any expert about what exposure levels to
10 asbestos or these substances are necessary to cause
11 harm, let alone ovarian cancer. So therefore, her
12 testimony is not relevant as to asbestos and will not
13 help the jury.

14 THE COURT: Let me stop you there. First off,
15 I mean, can't that, A, be an issue for a jury, but, B,
16 plaintiff argued that I thought -- I don't remember who
17 they said, the EPA maybe has said that any exposure
18 isn't safe.

19 MR. HEGARTY: And I think that is a -- that is
20 a flawed methodology, Your Honor, that would be rejected
21 by Illinois courts because to say that there's no safe
22 dose -- which is I think along the lines of what you're
23 talking about or what plaintiff says, there's no known
24 safe level of asbestos -- means that they're arguing

1 that any exposure to asbestos causes harm. Which we
2 cite a number of references to courts in this state that
3 have rejected that proposition. There -- any -- an
4 expert who purports to rely on an any exposure theory is
5 not applying a generally accepted methodology. And
6 that's what we have here. And the cases we cite, we
7 cite Wannall [ph] and McKinney and Nolan, and there's a
8 recent Krumwiede v. Penco case that talks about the fact
9 that these any exposure theories are not scientifically
10 valid, and that's what plaintiffs are relying on,
11 including Dr. Plunkett. She's relying on an any
12 exposure theory or really just being in the vicinity.

13 THE COURT: The other thing -- I don't know if
14 it's in this one or another one, that plaintiff's
15 argument is, well, you guys don't -- there's no -- the
16 defendant doesn't say what's acceptable and what's not.
17 And I know that's not your job.

18 MR. HEGARTY: Right, it's not our job. It's
19 their burden to show that -- what exposure levels are
20 capable of causing ovarian cancer and that a plaintiff
21 was exposed to that exposure level. And none of their
22 experts do that. So that is what we believe a flaw in
23 her methodology that should lead to her being excluded
24 in this case.

1 And what she does have, Your Honor, is these
2 studies looking at heavy occupational exposure to raw
3 asbestos. That is exposure by women working in asbestos
4 factories that have looked at that exposure with regard
5 to ovarian cancer risk. But there's no generally
6 accepted methodology that can properly apply those
7 studies to someone using talcum powder. And Dr.
8 Plunkett herself doesn't quantify the two exposures to
9 show any similarity. And again, in reality what she is
10 applying is a no dose or any exposure theory just like
11 their other experts.

12 She looks at these heavy occupational exposure
13 studies and findings as to those studies and concludes
14 that any exposure to asbestos from talc causes cancer.
15 The problem is that opinion just leaps over the concept
16 of dose and dose shown to be harmful and just requires
17 there is an exposure.

18 Now, the same thing is true with regard to her
19 testimony about fibrous talc, heavy metals and
20 fragrance. There are no studies showing that these
21 exposures caused ovarian cancer generally, and there are
22 no studies showing harmful exposure levels to these
23 studies that can cause ovarian cancer from talcum powder
24 use. For her opinion it boils down to the general

1 concept that these substances have evidence of being a
2 carcinogen in some context without any analysis of the
3 dose, just saying that if these substances are in talcum
4 powder they cause cancer. Again, that's just a no dose
5 or any exposure opinion that's been rejected by the
6 courts in Illinois.

7 And again, what the plaintiffs say is these are all
8 constituents of talcum powder that contribute to being a
9 carcinogen. But as I talked about earlier, Dr. Plunkett
10 has not shown through any methodology that these
11 substances have a carcinogenic effect for ovarian cancer
12 when they are allegedly in talc. And there's no showing
13 at what levels they are in talc.

14 Again, what Dr. Plunkett and plaintiff say is that
15 because some studies of the raw material at specific
16 exposure levels show carcinogenicity, the mere alleged
17 presence of this material proves they can cause cancer,
18 but there's no scientific or medical data or any type of
19 data that has shown this.

20 Another way to look at this as to her opinion as to
21 the mineral talc, she calls the mineral talc a
22 carcinogen, and then she purports to reference these
23 other constituents without any methodology or data to
24 show that they add to or otherwise affect talc

1 carcinogenicity when they are in talc. In essence, it's
2 her just speculating that because in other context
3 looking at these substances alone as specific doses,
4 there's a showing of carcinogenicities and not even
5 ovarian carcinogenicities, they must be contributing if
6 they are in talc.

7 Such speculation is not the subject of a generally
8 accepted methodology, and again, it's the example of
9 jumping to the finish line without running the race.
10 And I think there's a real danger with the kind of
11 opinions Dr. Plunkett and plaintiff intend to offer
12 because they are not scientific. If they are being
13 offered by an expert to give them credibility that they
14 don't deserve, it's not sound science. In fact, it's
15 false to simply say that a person is at risk for cancer
16 simply because they were around what is called a
17 carcinogen. There has to be scientific data to show
18 that this exposure was at a level capable of causing the
19 disease of interest. And Dr. Plunkett doesn't have that
20 as to asbestos, fibrous talc, heavy metals or fragrance,
21 which is why her opinions should be excluded.

22 Now, I want to talk a moment about her opinions as
23 they relate to business practices, legal and regulatory
24 practices, warnings, knowledge and intent. And those

1 opinions should be excluded, starting with her business
2 practices opinion. They are supposedly based on her own
3 specific experiences which amount to no more than her
4 say so. It's just her individual experience without a
5 methodology to show that they're reliably applied to the
6 facts of this case. In other words, she cannot show
7 that her unique individual experience on business
8 practices is a generally accepted methodology to offer
9 opinions about the defendant's business practices.

10 More importantly, these and her other opinions
11 about legal regulatory warning issues and internal
12 documents are all just improper subjects from expert
13 testimony. What regulations say and how they are
14 applied are just legal issues decided either by the
15 court or factual issues decided by the jury.

16 For example, Dr. Plunkett wants to get on the stand
17 and read a regulation about warnings, interpret the
18 regulations and offer an opinion as to whether the
19 defendants complied with a regulation. That gets into a
20 legal conclusion, and the jury is more than capable of
21 reading the regulations and deciding for itself whether
22 the company's complied with the regulation. The jury
23 can likewise read and interpret for itself internal
24 company documents, and it doesn't need someone like Dr.

1 Plunkett doing its interpretation for them. That's what
2 plaintiff's going to ask Dr. Plunkett to do, look at a
3 document and give her spin on it.

4 And as the court's going to see with these
5 documents that plaintiffs intend to use, the jury does
6 not need assistance in reading and understanding. And
7 they also are going to ask Dr. Plunkett to testify about
8 motives, intent, the state of mind of the folks in these
9 documents. Not a proper subject of expert testimony.

10 And what we really want to alert the court by this
11 motion is what Dr. Plunkett has done at other trials.
12 She's given a binder of internal documents and spends
13 her time, sometimes more than a day on the stand,
14 telling the jury who can read and understand the
15 documents themselves what the documents say and what she
16 thinks about them and what she thinks the authors
17 intended by their statements. She is essentially like
18 an attorney for the plaintiff sitting on the stand as a
19 supposed expert and arguing to the jury about the
20 meaning of hundreds of documents, what the authors
21 meant, where the documents are no more specialized than
22 an e-mail or a memo. These are not documents with
23 complicated data or difficult scientific concepts but
24 folks talking to each other about matters easily

1 understood by the jury. Having someone just parrot what
2 internal documents say and talk about what they mean is
3 not what Rule 702 allows and is not the job of an
4 expert. That's the job of an attorney during closing
5 argument after the document has been admitted into
6 evidence. Before that the jury can read the document
7 itself when it comes into evidence.

8 Now, courts have allowed Dr. Plunkett to testify as
9 to these matters. The courts have also excluded these
10 opinions. But this will not shortcut what this court
11 has to decide as to how far it's going to let a witness
12 like Dr. Plunkett assume the role of the court and the
13 jury to talk about matters the jury is fully capable of
14 of handling and should handle itself.

15 So we would ask the court to exclude Dr. Plunkett's
16 opinions about business practice, the meaning of FDA
17 regulations and statutes, compliance with FDA
18 regulations, warnings and adequacy of labeling, content
19 of internal documents, the intended motive of the
20 authors and folks of these documents, and then as the
21 court mentioned (Distorted audio.)

22 THE COURT: Whoa. The last one -- now I'm
23 getting feedback from somebody. And Ted, you're going
24 to take this one up, right?

1 MR. MEADOWS: Yes, Your Honor. I had a little
2 difficulty hearing you. I'm getting a lot of feedback
3 also.

4 THE COURT: Let me mute everybody else. Is
5 that better?

6 MR. MEADOWS: Much better for me, yes.

7 THE COURT: Okay. A couple things, going back
8 to Mr. Hegarty real quickly, as it relates to getting
9 into state of mind and things like that, again, what the
10 plaintiffs argue is that they don't say -- she's not
11 going to talk about their state of mind but really what
12 reasonable companies do and I guess reasonable companies
13 by reverse inference don't do, and then she's going to
14 use her experience in advising companies on FDA warnings
15 and stuff like that to assist with that and that
16 whatever. That's a little bit different than talking
17 about her state of mind, right? You have to un-mute.
18 You have to un-mute. Mark. There you go.

19 MR. HEGARTY: Sorry, Your Honor. I think if
20 you look at their briefing on that point, I don't think
21 they say exactly that. I think they actually admit that
22 she does intend to comment on what the authors of these
23 documents were intending or thinking when they wrote
24 them. And in my experience from other trials, that's

1 what she has tried to do is to go beyond, is to
2 interpret the meaning of these documents or intent of
3 these documents.

4 But even aside from that, these are documents that
5 the jury could easily understand and read themselves
6 once they are admitted into evidence. They don't need
7 an expert witness with any specialized knowledge to
8 assist them in their reading of the English language.
9 And that's what we have going on here is someone who's
10 going to be talking about subject areas that are not
11 scientifically complicated or scientific data but simply
12 somebody -- what somebody is saying in an e-mail or a
13 memo.

14 THE COURT: Isn't that something we would take
15 up at trial?

16 MR. HEGARTY: Well, we will take it up at
17 trial. There's no doubt about that.

18 THE COURT: Okay.

19 MR. HEGARTY: But I think it is -- and I
20 recognize that perhaps it is difficult to rule on that
21 motion in a vacuum --

22 THE COURT: Right.

23 MR. HEGARTY: -- without seeing the documents.
24 But there are certainly concepts like state of mind,

1 motive, intent, and the proper role of a Rule 702 -- an
2 expert in a Rule 702, that I think the court can give
3 clarity by its decision as it relates to this motion.

4 THE COURT: Okay with that, Mr. Meadows?
5 Sorry.

6 MR. MEADOWS: Yes, Your Honor. Thank you. And
7 I think the brief makes the points that we want to make,
8 but I'll just -- in quick response to the questions
9 about motive and intent, I have put Dr. Plunkett on the
10 stand numerous times in the talc litigation and in
11 different courts. I have never known her to speak to
12 what somebody's intent was at the time they wrote
13 something. She does look at internal documents that go
14 back many decades, the J&J documents that have been in
15 their files for many decades, that do show what in
16 company was, how they were --

17 THE COURT: Can we stop for one minute and take
18 a short break?

19 MR. MEADOWS: Certainly.

20 THE COURT: Thanks.

21 (Whereupon a brief recess was taken, and the
22 proceedings subsequently continued, as
23 follows:)

24 THE COURT: Going back on the record.

1 Mr. Meadows, I apologize. I rudely interrupted you so
2 we could we could take a short break, so please continue
3 if you remember where you left off.

4 MR. MEADOWS: Yes, and no apology necessary,
5 Judge. I too have children, and they are no longer
6 teens but they still need us. I'll put it that way.

7 In any event, Judge, I'll try to speed this along.
8 I think that getting to the issue at hand, whether Dr.
9 Plunkett is qualified under Frye, I think there's
10 more -- she has more than enough qualifications. They
11 go back decades. You already mentioned the fact that
12 she worked for industry for Environ for a number of
13 years, which is an industry group.

14 THE COURT: Right.

15 MR. MEADOWS: She did risk assessment, which is
16 the very methodology she's using here to assess products
17 and whether or not they're a potential risk to
18 consumers. She actually assessed talc in the 1990s long
19 before she ever met a lawyer or went to work for
20 plaintiffs' lawyers or certainly met me.

21 And then she spent the last several decades not
22 only doing litigation work, but working for industry,
23 and in particular, cosmetic companies in assessing risk.

24 And I think it's important to note, Your Honor,

1 that that's really what the issue is here. Much of what
2 defense attempts to do with Dr. Plunkett is similar to
3 what they're doing with the Frye standard. They put on
4 her a much heavier burden than what she's really
5 offering. And while she has given causation opinions
6 before, she is not doing so in this case. It's
7 unnecessary when you have witnesses like those who have
8 been described by Miss O'Dell and Mr. Dearing who can
9 carry the water on causation. It's a heavy enough
10 burden for Dr. Plunkett just to assess risk. And risk
11 is much different from causation when it comes to making
12 a determination as to whether or not a product,
13 especially a cosmetic which provides no health benefits,
14 should provide warnings to consumers.

15 So that's what she's doing, and she's not doing an
16 exhaustive review and an assessment like the gynecologic
17 oncologist is doing in this.

18 So part of her methodology in that is not only
19 looking at studies but in looking at internal documents
20 to see what the company -- how the company was assessing
21 risk at different points in time. And that stretches
22 back to the 1940s in this case when studies first
23 started coming out and the companies started looking at
24 studies and memorializing what they were seeing in

1 studies in their own internal documents. And so she
2 does that to assess risk and make a determination as to
3 whether or not J&J should have been warning during those
4 particular time periods.

5 So I think she's qualified to give opinions and she
6 also shows a good methodology, although that certainly
7 would be subject to cross examine under Frye by defense,
8 but I think she does show that she's using risk
9 assessment, which is an accepted methodology in
10 Illinois, as I understand it. And she also is doing
11 what people in her line of work do every day in the way
12 she looks at the materials that are offered to her on a
13 day-to-day basis by industry. She's doing the same
14 thing in this case to reach her opinions in the case.

15 So I think that she would be valuable for a jury to
16 hear because she does have knowledge of industry and the
17 way industry conducts day-to-day businesses. She
18 understands the lingo, is able to explain that to the
19 jury, which can be quite specialized at times, as well.

20 So I think -- Your Honor, I would ask that you deny
21 defense motion to strike Dr. Plunkett.

22 THE COURT: Mr. Hegarty, last word? Oh, I
23 muted you, so hold on. I need to un-mute you again.
24 There you go.

1 MR. HEGARTY: Thank you. Yeah, just quickly, I
2 think the comments about what her testimony is going to
3 get into really prove our point. The references made as
4 to how the company was assessing risk, whether the
5 company should have been warning during the relevant
6 time period based on the documents, that's the job of
7 the jury, Your Honor. The jury can look at the
8 documents once they're admitted into evidence and decide
9 for itself those two issues. And the lawyer can argue
10 what he wants to argue or she wants to argue during
11 closing argument about what those documents mean. But
12 it's improper for Dr. Plunkett to get on the stand and
13 act in the role of a lawyer during closing argument and
14 argue what she says the documents -- what she concludes
15 based on what the documents say about how the company
16 was assessing risk and when they should have been
17 warned. These are issues that the jury is more than
18 capable of handling for itself and determining for
19 itself when it reads the documents.

20 THE COURT: With that being said, again, I have
21 read the briefs. I think Mr. -- I'm sorry Ms. -- Dr.
22 Plunkett is qualified. Her methodology certainly passes
23 all the tests needed to be able to at least present
24 evidence in court. I think her, you know, toxicological

1 opinion, you know, as the plaintiff points out, it's
2 building a foundation for Dr. Smith's.

3 In any event, I do recognize that there's probably
4 going to be issues with objections at trial with Dr.
5 Plunkett's testimony that will certainly need to be side
6 barred or taken back in chambers maybe to be argued, but
7 we'll just have to see how that comes out at trial. I
8 recognize that and kind of glad that we're able to get a
9 heads up.

10 The motion to exclude Dr. Plunkett is denied.

11 And that leaves us with Dr. Rigler, at least as far
12 as the motions to exclude. I assume, Mr. Hegarty, this
13 is you again?

14 MR. HEGARTY: Yes.

15 THE COURT: You're carrying all the water
16 today.

17 MR. HEGARTY: Just me and Jason. So I didn't
18 know if you wanted to pass along your notes first or you
19 want me to just jump in, Judge?

20 THE COURT: I'll be happy to go over some of
21 mine.

22 MR. HEGARTY: Whatever you want to do. I would
23 be happy to jump in and just go. Whatever you want,
24 Your Honor.

1 THE COURT: Again, you guys argued that his
2 opinions are irrelevant because none of the plaintiff's
3 specific cause experts offer admissible opinions that
4 asbestos or fibrous talc played a role in causing her
5 cancer, or the small amount that Dr. Rigler detected
6 would be consistent with asbestos exposure.

7 Defendants argue that he didn't use generally
8 accepted methodology in testing talc samples for
9 asbestos and fibrous talc. None of the samples were
10 from what plaintiff used. Small amounts were detected,
11 although when I read that argument repeatedly I
12 wondered, well, what amounts are supposed to be? I
13 don't know if it's -- you know, it may be
14 microscopically small, but good Lord, there are some
15 things that can be microscopically small and still be
16 hugely problematic even if it's a small sample.

17 And then there was a lot of discussion about the
18 detection of fibrous talc and whether or not it
19 differentiated with asbestiform talc and non-asbestiform
20 talc. And the fibrous talc they tested wasn't the
21 asbestiform talc that the IARC deems carcinogenic. No
22 harmful amounts were in the samples they got. There's
23 talking about bundles versus cleavage in the talc
24 samples, if I recall all of that correctly as well.

1 And then plaintiffs say in response that the NOISH
2 says there's no evidence for a safe level of asbestos --
3 I think that there's no safe level of asbestos. That in
4 samples the labs got 68 percent of amphibole asbestos,
5 A-M-P-H-I-B-O-L-E, and 98 percent fibrous talc. That
6 Dr. Smith says that the product was a substantial cause
7 of plaintiff's cancer. Dr. Godleski didn't need to find
8 asbestos in the plaintiff's tissue for tests to be
9 relevant. It was enough that Rigler found asbestos in
10 the majority of samples during the relevant timeframe.
11 I guess it's the IARC does not provide what a safe level
12 is.

13 Plaintiff argued they testified any asbestos form
14 amphibole, and then Longo first -- that's L-O-N-G-O --
15 first eliminated non-asbestos fibers that need not meet
16 criteria. And there no distinction between asbestos and
17 cleavage fragments or fibers versus bundles and whether
18 or not a fiber is asbestos form.

19 It gets a little bit more technical with Rigler.
20 Is this going to be you, Ms. O'Dell?

21 MS. O'DELL: Yes, sir, it will.

22 THE COURT: So, again, a little bit more
23 technical on Dr. Rigler, but please go ahead.

24 MR. HEGARTY: Thank you, Your Honor. Again,

1 Mark Hegarty for the Johnson & Johnson defendants.

2 And with regard to the testing results that Dr.
3 Rigler purports to talk about, it's important to note
4 that none of those tests involve any talcum powder that
5 the plaintiff used in this case, Miss Driscoll. And a
6 number of the tests, in fact, essentially half of the
7 tests that he performed concerned a product she never
8 used, Shower to Shower. So much of his testimony will
9 be about products that plaintiff never used. Actually,
10 all of his testimony will be about products that
11 plaintiff never used, and the vast majority of the
12 products he tested were not even from the time period
13 that plaintiff allegedly used Johnson baby powder, from
14 1966 to 1970.

15 And the test results that Dr. Rigler intends to
16 discuss purportedly found what he calls asbestos in a
17 certain percentage of samples and what he calls fibrous
18 talc --

19 THE COURT: Right.

20 MR. HEGARTY: -- in a certain percentage of
21 samples. And I say what he calls asbestos in fibrous
22 talc because, as we said in our briefing, these labels
23 are loosely applied and do not reflect what he actually
24 saw. And we'll come back to that in a moment. But as

1 we've been talking about throughout this morning, the
2 issue of asbestos in talc is a major point of contention
3 in this case, both as to its relevance as it relates to
4 Miss Driscoll and as to his very presence at all.

5 And first as to relevance, as we talked about, this
6 is ground number one why the court should exclude his
7 testimony. The entire issue of asbestos in talcum
8 powder is irrelevant because it played no role. It's
9 undisputed that no witness will testify that plaintiff
10 had any asbestos in her tissues or any physical finding
11 reflecting asbestos exposure, such as lung tissue damage
12 or any other supposed marker of asbestos exposure.

13 And Dr. Smith -- I know we talked about her -- did
14 not attribute plaintiff's ovarian cancer to asbestos
15 exposure. This is what she said at page 67 of her
16 deposition. Question, is it your opinion that asbestos
17 in talcum powder products that Miss Driscoll used
18 contributed to cause her ovarian cancer? Answer, I have
19 no knowledge that there was asbestos in her baby powder
20 products demonstrated in the information that I've seen.

21 So the testimony is clear that Dr. Smith,
22 plaintiff's only case specific causation witness, is not
23 basing her opinions on alleged exposure to asbestos. So
24 given this testimony, Dr. Rigler's testimony about

1 asbestos is irrelevant.

2 Now, in addition and importantly, the testing of
3 bottles not used by the plaintiff cannot be used to show
4 that the talcum powder the plaintiff actually used was
5 of the same sort.

6 Now, Dr. Rigler wants to talk about seven bottles
7 he tested during the time period at issue, and he says
8 he found asbestos in two of those bottles -- again, not
9 used by the plaintiff -- and said that's enough to show
10 that plaintiff was exposed to asbestos from talc. But
11 that is pure speculation for a witness or anyone else to
12 argue that these tests reflect or represent the bottles
13 that plaintiff used. In fact, it's speculation on
14 speculation. Speculation that any bottles she purchased
15 contained asbestos, speculation as to any levels of
16 asbestos in those bottles, it's speculation as to the
17 amount of actual exposure by plaintiff to asbestos.

18 In a separate but related ground to exclude his
19 testimony is the concept we've been talking about, that
20 is dose or level of exposure. Plaintiff has no witness
21 who will testify about the dose or level of exposure to
22 asbestos they allege plaintiff had from her use of
23 talcum powder or what dose or exposure to asbestos is
24 necessary to cause ovarian cancer and that plaintiff was

1 exposed to such a harmful dose.

2 Again, plaintiff is advancing a really no dose or
3 any exposure theory as it relates to asbestos that has
4 been rejected under Illinois law in the cases that we
5 cite.

6 And Your Honor, you mentioned that the amount that
7 Dr. Rigler contends that he found through his testing,
8 .00017 or one seven -- 1.7 hundred thousandths of a
9 percent as the median bottle. The highest concentration
10 was .0092 of a percent. And that's in comparison to the
11 1 percent threshold that EPA uses to define an asbestos
12 containing material.

13 More importantly, the studies that have linked
14 asbestos exposure to ovarian cancer have involved heavy
15 occupational exposure to asbestos. There are no studies
16 showing an association between the levels of exposure
17 that Dr. Rigler wants to discuss and ovarian cancer.

18 So, again, there's no basis to say that exposure to
19 asbestos at the levels that he wants to talk about is
20 even relevant to ovarian cancer risk.

21 And as to his testimony about so-called fibrous
22 talc, again, it's irrelevant in this case. No finding
23 of fibrous talc in this case. There are no studies
24 showing that fibrous talc is harmful, let alone can

1 cause ovarian cancer. And we'll refer the court to the
2 briefing on this subject, but what Dr. Rigler calls
3 fibrous talc is not talc containing asbestos or talc
4 containing -- talc that is asbestos form but -- and
5 there are no studies showing that fibrous talc is
6 carcinogenic.

7 In addition to being irrelevant, his opinions
8 should be excluded because his findings are not based on
9 a generally accepted methodology. And particularly, he
10 calls structures asbestos that are not, minerals that
11 are asbestos also come in non-asbestiform. When these
12 non-asbestiform materials break they can form long and
13 thick fragments -- thin fragments which the court
14 mentioned are cleavage fragments.

15 There are no studies that show these cleavage
16 fragments cause harm, including ovarian cancer. In
17 fact, the studies that have been done show that they
18 don't cause harm. So it's important to distinguish
19 these fragments from true asbestos, yet Dr. Rigler
20 doesn't do that by his cattiness. He calls cleavage
21 fragments asbestos.

22 Now, plaintiffs in their opposition refer to
23 methods that are used to identify asbestos. They talked
24 about the Asbestos Hazard Emergency Report Act. But

1 those methods do not distinguish between asbestos and
2 cleavage fragments despite -- all they look at is length
3 and width of the particle. And plaintiff talked about
4 transmission electron microscopy or TEM, energy
5 dispersion -- dispersive X-ray analysis or EDXA;
6 selected area diffraction or SAED, but these methods are
7 not (Inaudible.) in this motion. The challenge here is
8 that these methods cannot receive cleavage fragments or
9 other particles from asbestos.

10 Now, also the plaintiff in their opposition throws
11 a lot of references around concerning asbestos, cleavage
12 fragments, elongated particles, and again, this is
13 technical. I refer the court to the briefing on these
14 issues. But the bottom line is that the distinction
15 between asbestos and cleavage fragments means something.
16 It's real. They are two different types of minerals
17 with two different types of risk profiles. It's not
18 scientifically, medically, methodologically sound to not
19 distinguish between the two structures, as government
20 and regulatory authorities do and to not distinguish
21 between the two between in terms of their potential
22 effect on tissue.

23 Now, I want to go back to where we started where we
24 have been talking about today. This is a case about

1 Miss Elizabeth Driscoll. We're not trying some generic
2 talc case dealing with just certain generic issues. The
3 claim in this case is that the baby powder that Miss
4 Driscoll used contained asbestos that caused her to
5 develop ovarian cancer, whether it contained fibrous
6 talc and caused her to develop ovarian cancer.

7 There are no tests showing any bottles she used
8 contained asbestos or fibrous talc. There have been no
9 finding of asbestos or fibrous talc in her tissues, and
10 there's no evidence of dose generally that is harmful,
11 or specifically that Miss Driscoll was exposed a harmful
12 dose.

13 While maybe in some of these other cases these huge
14 evidentiary holes can be argued have been filled, but
15 that's not what we have here. The case is about
16 exposure to baby powder, not about asbestos and fibrous
17 talc. And this is not just me saying this but
18 plaintiff's expert, Dr. Smith, saying this.

19 So, while we ultimately may talk about asbestos in
20 cleavage fragments, we should never get that far because
21 Dr. Rigler's opinions are irrelevant. We've not --
22 we've been through impermissible speculation about the
23 powder that Miss Driscoll used and do not in anyway
24 include necessary dose information for anyone to show

1 harm. So we'd ask that Dr. Rigler's opinions be
2 excluded.

3 THE COURT: Before we go over to plaintiff's
4 response -- and I'm getting feedback so I'm going to
5 mute you, Mr. Hegarty. Then I'll un-mute you in a
6 second. But this argument that nobody tested the
7 bottles of talc that she used, you know, back in
8 whatever -- I'll just say for the sake of argument in
9 the seventies -- I don't find that to have -- really to
10 have any merit. I mean, I think oftentimes experts go
11 back and check, you know, whatever. The easy example,
12 at least for me -- and I know there are differences in
13 the way it operates and all that, but if somebody smoked
14 Marlboros or whatever, Chesterfields in the seventies, I
15 mean, we understand that those cigarettes can still be
16 tested. They don't need the exact cigarettes that
17 somebody used then. I mean, that's -- to me that's a
18 bit of a -- I understand that defendants have to make
19 that argument, but it's an -- it sets up an
20 impossibility. But I don't expect you to address it,
21 but if you want to, Mr. Hegarty, you can feel free to.

22 MR. HEGARTY: I will address it just briefly.
23 And Your Honor, courts have kept out this testimony.
24 There's an opinion out of Georgia called Hanson.

1 There's an opinion out of Wisconsin called Chapp where
2 the evidence was the same. I tested some bottles that
3 were not used by the plaintiff and I want to try to
4 extrapolate that to what the plaintiff used, and the
5 courts there concluded that that's purely speculation.

6 And it's particularly important here because half
7 of the tests that were done by Dr. Rigler concerned a
8 product that Miss Driscoll never used.

9 THE COURT: Right, the Shower to Shower, right?

10 MR. HEGARTY: Shower to Shower. And also, the
11 number of bottles he tested during the relevant time
12 period, seven, only two of which he reported finding
13 asbestos.

14 So I do think that there's a good faith and
15 certainly a legal basis to argue that it would be
16 speculation -- it is speculation of what Dr. Rigler is
17 purporting to do here, impermissible speculation where
18 there is no methodology that has been done to try to
19 extrapolate to show that there is a reliable -- that you
20 can draw a reliable opinion from trying to extrapolate
21 testing done on product years ago to what a particular
22 plaintiff used, particularly where the testimony here is
23 of a sister --

24 THE COURT: I understand. I do understand.

1 MR. HEGARTY: Okay.

2 THE COURT: And you've made the argument.

3 MR. HEGARTY: Thank you.

4 THE COURT: But just for the sake of preventing
5 feedback -- and you can un-mute yourself or raise your
6 hand if you want to try to interrupt Ms. O'Dell, but
7 I'll give her the same respect that she gave --

8 MR. HEGARTY: Thank you.

9 THE COURT: -- you. Ms. O'Dell, plaintiff's
10 response, if any.

11 MS. O'DELL: Your Honor, there are some things
12 I'd like to take up just to make sure the record is
13 clear. And let me just -- I'm going to start with some
14 of the last comments that Mr. Hegarty made because I
15 believe that maybe in the heat of battle he would --
16 painted with a broader brush than would be appropriate.

17 For example, the Hanson decision he referred to in
18 Georgia does not involve the same testing that is at
19 issue here, does not involve the same experts, does not
20 involve the same samples. And so to suggest that
21 somehow these samples and the testing results from these
22 samples have been excluded in that court, that would not
23 be accurate.

24 Second, in regard to Johnson's baby powder, which

1 is the particular product that Miss Driscoll used, and
2 Shower to Shower, they are different in the sense that
3 they're two products, but the talc that was used to make
4 those products is the same. And the talc that Dr. Longo
5 and Dr. Rigler tested involved the same talc. It came
6 from the same mines. And so those samples are equally
7 relevant to Miss Driscoll's use because it's talking
8 about the same material that made up the product.

9 You'll see also in the testing -- well, let me stop
10 there. Let me pick up another line.

11 You know, there will be testimony from Miss
12 Driscoll's sister about her use of talc. There will be
13 testimony from other family members about seeing talc
14 over the years in her bathroom. And so certainly
15 there's specific testimony about a period of time, but
16 as Your Honor has commented this morning, there's
17 circumstantial evidence this was a feminine hygiene
18 practice that she used for many years. So let me make
19 that comment.

20 Quickly, just to be conscious of the court's time,
21 you know, I'll try to be brief but I do want to point
22 out a couple things as we go through, Your Honor, that
23 might be of help.

24 First, let me share my screen if I can. And I'm

1 assuming what you can see here is this slide, Your
2 Honor, with sort of constituents of Johnson's baby
3 powder and Shower to Shower. You've heard a lot today
4 about dose and specific dose of specific constituents of
5 Johnson's baby powder, but you have testimony, Your
6 Honor, of Dr. Smith's consideration of exposure and
7 dose, and that's for the years of Miss Driscoll's usage.
8 There is no requirement that there be a specific dose
9 calculation of the constituents.

10 Much like in a cigarette case for lung cancer, you
11 focus on the number of pack years. You don't focus on
12 the specific dose of the 70 chemicals that are contained
13 in the actual cigarettes. And so the dose arguments in
14 that sense are a red herring, if you will.

15 Each of these elements have been evaluated by The
16 International Agency For the Research of Cancers, and we
17 refer to that often, Judge, as I-A-R-C --

18 THE COURT: Uh-huh.

19 MS. O'DELL: -- or IARC. And they have
20 evaluated these constituents of Johnson's baby powder
21 and found that they're either a possible carcinogen in
22 the case of plain talc, or in the case of fibrous talc
23 -- which we're going to talk about a little bit more,
24 and I'll try to be brief -- but that is a needle-like

1 fiber that has been determined by IARC in the 2012
2 monograph to be a human carcinogen for ovarian cancer.
3 We see that in asbestos. The 2012 monograph, as the
4 court is aware, determined that asbestos and amphibole
5 asbestos -- which is what Dr. Rigler tested for --
6 causes or can cause ovarian cancer. And then you'll see
7 some of the other constituents here. And so it's all
8 those constituents they work together, they're one
9 product, that cause ovarian cancer, and these
10 constituents help explain what you see in the
11 epidemiological literature.

12 Now, I'm not going to go over Dr. Rigler's
13 qualifications, but he is a Ph.D. He's tested materials
14 for asbestos and other fibers for more than 30 years.
15 He's eminently qualified. You know, in the argument
16 previously -- and I know the court is aware -- and Your
17 Honor, I'm going to skip around some. I have a nice
18 robust 57 slide deck here, but I'm not going to go
19 through it all. I'm just going to go through a few
20 because I want to -- because this is so technical, let
21 me just go through a couple things. As and I mentioned,
22 Dr. Rigler is eminently qualified. The lab that he was
23 working for at the time of these studies has been used
24 by the U.S. Government, by major corporations. They're

1 certified by basically every agency.

2 And as I mentioned, this analysis that will be the
3 subject of Dr. Rigler's testimony is of historical baby
4 powder, Shower to Shower, and Imerys is the talc
5 supplier, Your Honor, and they supplied talc for
6 Johnson's baby powder and Shower to Shower from the
7 1960's -- there were other corporate names but
8 essentially the same mine -- from the 1960's to the
9 early 2000's. And these samples -- to address some of
10 the arguments in the briefing just so the court is clear
11 -- were produced in the MDL. The chain of custody is
12 clear. They came from Johnson & Johnson. They were
13 produced by specific protocol. They were divided at a
14 joint lab. There's nothing about these samples' chain
15 of custody that is at issue.

16 And then what Dr. Rigler and Dr. Longo did is they
17 used a specific methodology to test them for the
18 presence of asbestos and --

19 THE COURT: Miss O'Dell?

20 MS. O'DELL: Yes, sir.

21 THE COURT: Can you slow down a little bit for
22 the court reporter?

23 MS. O'DELL: I sure can. Pretty rare that this
24 southern voice is too fast, but I'm sorry, this is a

1 favorite topic, so I apologize.

2 So let me just -- and I'll try to be brief. The
3 result after they apply their methodology was that 68
4 percent of the samples contained amphibole asbestos and
5 98 percent contained --

6 THE COURT: Uh-oh.

7 (Distorted audio.)

8 THE COURT: Okay, Ms. O'Dell, wait. Wait, Ms.
9 O'Dell.

10 MS. O'DELL: Yes, sir?

11 THE COURT: We froze up right after 60 percent
12 amphibole.

13 MS. O'DELL: Okay, I'm sorry, Your Honor.

14 THE COURT: Don't be sorry. It's not your
15 fault. I'm going to blame it on Judge Rudolf down the
16 hallway. He's probably doing something to take up all
17 of our bandwidth. You started with the 98 percent. And
18 from your briefing I know where you're going, but for
19 the record, please go ahead.

20 MS. O'DELL: Yes, sir, thank you. And I'll --
21 again, I'll try to be brief. But, you know, the results
22 of this testing was that 68 percent of the samples were
23 positive for amphibole asbestos and that 98 percent were
24 positive for fibrous talc.

1 And the way that they did this testing, Your Honor,
2 was that they used three methodologies. This
3 methodology of, one, evaluating the shape of the fiber
4 or the morphology; the second they evaluated the
5 chemistry; and then the crystalline structure.

6 Let me just say very briefly that this methodology
7 is methodology that has been employed by the FDA, by --
8 and let me just -- I'll flip through some slides here if
9 you'll bear with me, Your Honor. And you can see that
10 this is the testing machine that they used, the testing
11 microscope, transmission electron microscope. But very
12 briefly, Your Honor, they used these three methods, TEM,
13 EDXA for chemistry, and then an SAED machine to
14 determine the crystalline structure. And in each of
15 these samples they looked to see if the fiber itself had
16 an aspect ratio of greater than five to one and they
17 were at least five microns in length. That was their
18 methodology.

19 And my point, Your Honor, is that this methodology
20 and the way they counted the fibers, in other words,
21 they evaluated the shape or the needle-like structure,
22 is something that has been accepted by numerous
23 agencies.

24 THE COURT: You know what, Ms. O'Dell, that

1 symbol for micron, the kind of upside down UN thing --

2 MS. O'DELL: Yes, sir.

3 THE COURT: I bet I stared at that last night
4 for 45 seconds trying to figure out if my eyes were dead
5 or what that was. So I have now learned something new
6 that I'm sure I'll see again. So...

7 MS. O'DELL: You might see a little bit of
8 this, but we'll try not to emphasize it too much. But
9 this method -- and this from Dr. Rigler's report -- this
10 is the method that they used. You know, the
11 International Standards Organization, they use the same
12 sort of criteria for determining a fiber or elongated
13 particle. EPA uses the same.

14 J&J -- this is from a J&J document -- when they are
15 looking at an asbestiform -- and, Your Honor, just very
16 quickly, asbestiform is not necessarily asbestos. That
17 relates to the shape or the morphology of the particular
18 mineral. So talc can be asbestiform -- in other words,
19 it's needle-like -- as can asbestos. J&J acknowledges
20 that in their own documents. They talk about elongated
21 particles with parallel sides and an aspect ratio. They
22 use something that is less conservative than what Dr.
23 Rigler used.

24 Dr. Rigler and Dr. Longo have published on this

1 method. This ASTM, it's called the American Section of
2 Testing Methods -- it's a widely known and respected
3 organization -- they used the same methodology that Dr.
4 Rigler and Dr. Longo used in performing the testing
5 here. J&J again acknowledges that this is the
6 appropriate methodology.

7 And then actually, the FDA, they commissioned this
8 test that you see on the screen here. AMA Analytical
9 Services tested actually 2018 bottles of Johnson's baby
10 powder and found chrysotile asbestos, as well as a talc
11 fiber or fibrous talc.

12 THE COURT: So chrysotile for the court
13 reporter --

14 MS. O'DELL: Chrysotile --

15 THE COURT: Thank you.

16 MS. O'DELL: Yes, C-H-R-Y-S-O-T-I-L-E. So,
17 Your Honor, this is not novel. This is generally
18 accepted. And it's what -- it's the methodology that
19 Dr. Rigler and Longo safely applied to each sample.

20 So I'm just going to move quickly through this, but
21 in each sample -- this is one to give you a sense --
22 they did TM testing for the morphology in every sample.
23 Every sample that's positive they found a particle or
24 fiber that had an affect ratio of greater than five to

1 one. They noted it. They had a 2200 page report that
2 in great detail documents every finding.

3 This is -- you know, Mr. Hegarty made comments
4 about the microscopic amounts they found in the samples.
5 This is a TM grid, which is actually microscopic. This
6 is how you test, you know, these samples. And it's not
7 surprising that we would find a microscopic amount
8 because the sample is microscopic. And the generally
9 accepted method is to take those findings and
10 extrapolate those findings across the particular bottle
11 of talc in this instance.

12 So just in sum, they had to sort of check all the
13 boxes before Dr. Rigler made a determination that a
14 sample contained asbestos, and this particular method
15 was used exactly for fibrous talc. So all three steps
16 were confirmed before there was a finding that there was
17 either asbestos or fibrous talc in the samples.

18 And let me just give you a sense, Your Honor, just
19 very briefly of how much in terms of fiber structures
20 would be found in a nine ounce bottle. This is a 1978
21 sample. In this particular bottle they found that there
22 were 63,800 asbestos structures per gram. And if you
23 calculate that across the whole bottle, then it's over
24 16 million asbestos fibers. Which for Miss Driscoll

1 over the years that she used Johnson's baby powder, she
2 would use multiple bottles, many bottles of Johnson's
3 baby powder, and so the exposure is quite extensive.

4 So, lastly I'll just talk briefly about the
5 findings on fibrous talc. I have mentioned the overall
6 findings of nearly every bottle contained talc fibers.
7 And let me just be specific about one thing. It's
8 fibrous talc is the same thing as talc fibers or
9 asbestiform talc. And you'll see that in Dr. Rigler's
10 deposition, Your Honor, at -- excuse me here, at page
11 153 through 154. It's very specific. Those are the
12 same -- it's the same mineral, the same structure, the
13 same needle-like shape, but it's just a different name
14 for the same thing.

15 And then lastly, Your Honor, just to give you a
16 sense, every bottle of Johnson's baby powder essentially
17 has millions of fibers of talc which have been
18 determined to be human carcinogens by IARC. And so we
19 believe this testimony is not only relevant but that the
20 testing that was done is -- it was done in keeping with
21 the standards in the industry and it should be admitted
22 and the motion should be denied.

23 So thank you for your patience, Your Honor, and I
24 apologize if I went longer than I should right before

1 lunch.

2 THE COURT: No problem. Let me un-mute
3 Mr. Hegarty. There we go. Okay, Mr. Hegarty.

4 MS. O'DELL: Your Honor, may I say one thing?
5 Excuse me, Mr. Hegarty. With your indulgence, Your
6 Honor, I failed to mention this and it's a bit of a
7 significant point, is the MDL court evaluated this
8 report and these opinions and found it to be admissible
9 under the Daubert standard. Thank you.

10 THE COURT: Thank you.

11 Mr. Hegarty, last word?

12 MR. HEGARTY: Yeah, thank you, Your Honor.
13 Quickly, just a few responses -- responsive points.
14 With regard to my reference to the Hanson and the Chapp
15 cases, that reference concerned the methodology that the
16 experts were purportedly applying that the court
17 rejected. That testing did involve a different product,
18 but the testing was not the basis for the exclusion.
19 The basis for exclusion was the improper methodology to
20 try to extrapolate those findings to the plaintiff and
21 the plaintiff's use of the product.

22 There's a reference again we talked about to the
23 constituents and there was a comment made there's no
24 requirement of a dose showing in this state. Well,

1 that's just absolutely wrong. We can look no further
2 than the asbestos cases, McKinney, Nolan, Krumwiede, and
3 there is a finding. There is a requirement in that
4 there be more than a di minimis exposure. And so there
5 is a requirement of showing in the asbestos cases and
6 presumably as it relates to nickel, or acromion, or
7 fibrous talc that there has to be a showing of some dose
8 level and that that dose level is capable of causing
9 harm, and that's not shown as to any of the experts in
10 this case.

11 There was a reference made to fibrous talc, and
12 this is a repeated inaccuracy that plaintiffs make that
13 it's, that the IARC -- 2012 IARC monograph relates to
14 fibrous talc. The phrase "fibrous talc" is nowhere
15 contained in the 2012 IARC monograph. The 2012 IARC
16 monograph talks about the six regulated forms of
17 asbestos and talc containing asbestos. It does not in
18 any way refer to fibrous talc, nor make any finding as
19 it relates to fibrous talc. And these testing methods
20 that were talked about are testing methods that show
21 that they -- that plaintiffs show a fiber. It doesn't
22 show that they're asbestos, yet that's what plaintiff's
23 expert, Dr. Rigler, purports to say is that all fibers
24 that he found are asbestos. Asbestos is a term of art.

1 It's not something you just call any particle that
2 reaches a certain length and width.

3 And there's references to these exposure levels
4 where the argument was made that the plaintiff's
5 exposure was quite extensive. Well, no expert, Dr.
6 Smith, Dr. Godleski, no expert of the plaintiff as
7 related to Ms. Driscoll has looked at those exposures
8 and said they're quite extensive, has looked at those
9 exposures and said that is an exposure level that's been
10 shown to cause ovarian cancer and that she was actually
11 exposed to that exposure level.

12 Again, I invite the court to read the testimony of
13 Dr. Smith, read her report. There's not a single
14 reference in her report to a finding of asbestos or
15 heavy metals or fibrous talc as it relates to Miss
16 Driscoll. There just isn't. So this is all a side show
17 as to what this case -- this case about Miss Driscoll is
18 about, and that includes Dr. Rigler's testimony.

19 THE COURT: Thank you. Let me pause you guys
20 for a minute again. Thank you for the argument. The
21 court's again reviewed the briefing -- very good
22 briefing by the parties again -- and finds that Rigler,
23 as the other experts identified by the plaintiff thus
24 far, that his methodology is generally accepted and

1 reliable and the application is also generally accepted,
2 and his testing procedures and that he is indeed
3 qualified. There are some issues I understand that are
4 jury issues that may come up, but that -- those are
5 questions for the jury to consider at the appropriate
6 time, and they may come up as other motions may come up.
7 So the motion to exclude Dr. Rigler is denied.

8 That leaves us with the motion for summary
9 judgment, which I would call the main event. Who for
10 the defendant is going to argue that? You again,
11 Mr. Hegarty?

12 MR. HEGARTY: Me again, Your Honor.

13 THE COURT: I hope they pay you extra for all
14 of this, although Jason has picked up a lot of the
15 workload up until now as well, I should say.

16 MR. HEGARTY: We try to be efficient, Your
17 Honor, and if the court does deny our summary judgment
18 motion Jason and I will be doing the motions in limine
19 on June 1. So I do intend to split that one up. I just
20 thought for efficiency sake or effectiveness sake that
21 -- and given that the court said a lot of these are
22 related and intermingled --

23 THE COURT: They are.

24 MR. HEGARTY: -- that it makes sense for me to

1 talk about them all together.

2 THE COURT: And I should say with all the
3 parties -- I'll say it again because I can't say it
4 enough -- all the attorneys on both sides of the "V" in
5 this case are extremely professional. I'm sure I've
6 said it to you before how much I appreciate that.
7 You're all ultra prepared. You're not table bangers.
8 You're not screamers, at least yet, which I also
9 appreciate. You're not -- I haven't ran across that
10 with this crowd, so you all should be commended for
11 that. Now, you all may hate my rulings or not hate my
12 rulings or whatever. I can brag about this case that I
13 have I think aggravated both sides. I know plaintiff
14 was aggravated with me a year ago for continuing the
15 trial.

16 But with all that being said, we are now at the
17 motion for summary judgment. I can go through my notes
18 on that, as well. I can also jump to what I thought to
19 be the more interesting or the most, I don't know,
20 interesting part of all this, and that's the strict
21 liability product liability Statute of Repose being ten
22 years. And I get -- I understood the argument you made,
23 Mr. Hegarty -- whoever wrote the brief, if it was Jason
24 or not -- that in fact, the plaintiff has pled strict

1 liability and whatever count it was -- in fact, it's
2 still up on my computer I think -- and that there is a
3 ten-year Statute of Repose. And there's --
4 preliminarily, Mr. Johnson, your argument was, well,
5 wait a minute, under Dintelman this is actually a
6 negligence failure to warn product count. And then the
7 defendant came back and said, well, in Dintelman they
8 dismissed the strict liability product counts, so this
9 should be sort of dismissed, even though it's a motion
10 for summary judgment. And I wanted to bring that back
11 up to you guys, and even though it's a little bit of an
12 odd event, before we get started I kind of wanted to
13 throw that at Mr. Johnson. And again, I know this is a
14 motion for a summary judgment, but maybe you could help
15 clarify this for me from the plaintiff's point of view
16 since the headline of it says strict liability in that
17 count. But is it a negligence count or not?

18 MR. JOHNSON: Well, as I pointed out in my
19 briefing, Your Honor, if we're going to submit under
20 what is technically the 400 second of IPI, strict
21 products liability section of the IPI. Nevertheless, if
22 we're going to go forward with this failure to warn
23 count -- which we intend to do -- we would be submitting
24 400.07(d) as in dog, and by the notes on use, we would

1 have to define ordinary care in 10.01.

2 I cannot think of more negligence-based language
3 than fault and ordinary care. So one of our points --
4 and this is one of our points against the argument of
5 timeliness under the Statute of Repose is it doesn't
6 apply here, because what we are really asserting in our
7 count -- our counts -- I think it's Count I and VIII, I
8 believe, in the second amended complaint are fault-based
9 negligence principles, failure to warn.

10 And so the interesting thing about this argument is
11 if the court were inclined to grant the motion, then all
12 we would do is change the heading, right? We would just
13 --

14 THE COURT: Right. I get -- and maybe a little
15 bit of the wording within those two counts. So let me
16 -- and let me put this back on you, Mr. Johnson. I know
17 you bring up other reasons why fraudulent concealment
18 and other things, why you argue -- why plaintiff argues
19 it would still not be right. As I often do in these
20 cases is I throw it back to you and say, I don't know,
21 is that something you want to do; do you want to amend?

22 MR. JOHNSON: First of all, with all respect to
23 the Court, we don't have to decide this necessarily
24 today. We know what the issues are.

1 THE COURT: Right.

2 MR. JOHNSON: And as I mention, if the court
3 would be inclined to grant that, then we would come back
4 and just call it negligent failure to warn.

5 THE COURT: Right, right.

6 MR. JOHNSON: In which case, Judge, the whole
7 argument doesn't apply.

8 THE COURT: Right.

9 MR. JOHNSON: Can I just point out briefly the
10 other way to look at this. If you want to say, okay,
11 Johnson, you're wrong, the Statute of Repose does apply,
12 according to J&J's argument -- as you're aware from your
13 light reading -- 1966 is their argument about first
14 usage.

15 THE COURT: Right.

16 MR. JOHNSON: First sale, first sale in their
17 world. You know, if we say that the injury occurred
18 during this Statute of Repose period, you know, ten
19 Years after the first sale, and then we apply the
20 discovery rule of the Statute of Repose here, the death
21 occurred -- the death occurred in September of 2016.
22 We're well within the repose period. So if you want to
23 say it does apply, we're well within the repose period
24 within -- we filed within two years after the death

1 occurred. We don't think it does apply. And as Your
2 Honor pointed out, you recognize that we also plead
3 fraudulent concealment.

4 THE COURT: Yeah, and I guess we're getting
5 close enough to trial where in the interest of fairness,
6 I guess -- I mean, we're getting towards the point where
7 you're going to have to choose a lane of which way are
8 you going? Are you going under the negligence theory?

9 MR. JOHNSON: Well, Your Honor, if you're going
10 to grant the motion, then we certainly are going to ask
11 leave of court to change our heading to negligence
12 instead of strict products liability failure to warn.
13 Yes, we would be asking for that leave of court in that
14 event.

15 THE COURT: But right now you're not prepared
16 to say that's the route you're headed?

17 MR. JOHNSON: Well, we would like to have the
18 -- having articulated the court's very much aware of the
19 issue, we don't need to really do this today I don't
20 think. We can come back perhaps on June 1st and talk to
21 the Court about it. It's not going to affect trial
22 preparation for Misterters Hegarty and Rankin in any way,
23 shape or form.

24 THE COURT: Okay. Well, with that being said,

1 a lot of these arguments that were brought up were also
2 brought up, as we mentioned early on, in the motions to
3 exclude the experts, including that the defendant says
4 there's no specific causation -- there's no general or
5 specific causation, and that the experts can't say how
6 much was needed to be used to cause and no sufficient
7 testimony in how much she used it.

8 Again, that it could have been caused by not having
9 a baby or long menstrual periods, who knows. They bring
10 up the product liability, the Statute of Repose. And
11 then there's a preemption argument brought up that it's
12 preempted by the FDA because of a letter -- because they
13 rejected a cancer warning about seven years ago. Of
14 course, we don't know what evidence was provided
15 throughout all that, or what evidence was even available
16 then, or if the letter was really binding and legal or
17 not.

18 Defendant also argues there was no evidence that
19 there was a duty to warn because they didn't know at the
20 time the product was used. And the first study was
21 allegedly in 1971. They argue there's no negligent
22 misrepresentation or breach of express warranty because
23 general statements that products are safe aren't
24 actionable and there's no evidence Miss Driscoll relied

1 on them, except that she bought them. Which I would say
2 is -- I don't think somebody -- well, people buy -- who
3 knows, but it seems that that's -- that could be an
4 inference allowed. But as to the conspiracy claims,
5 there's no evidence that defendant entered into an
6 agreement with anyone.

7 Then there's some -- going again into the expert
8 stuff but still, as I think Mr. Hegarty just argued, you
9 have to show exposure's not just de minimis.

10 There's also, again, what I brought up about the
11 Dintelman arguments back and forth.

12 So, with that being said, Mr. Hegarty, go ahead.

13 MR. HEGARTY: Okay, thank you, Your Honor.
14 Mark Hegarty for the Johnson & Johnson defendants. With
15 regards to the arguments made as to general and case
16 specific causation, we really covered those, and they
17 relate to the admissibility of the experts' opinions.

18 I'm focusing on the other grounds, some of which
19 the court has already mentioned here. The first as it
20 relates to plaintiff's strict liability warranty --
21 strict liability and warranty claims. As Your Honor
22 noted, the counts themselves, Counts I and VIII, are
23 labeled as strict liability claims, and they are barred
24 by Illinois' ten-year Statute of Repose which runs from

1 the date of the first sale.

2 And that first sale, according to -- as alleged by
3 the plaintiff, is 1966. So, based on this undisputed
4 fact, there's no factual or legal authority that these
5 strict liability claims can proceed. And as to the
6 warranty claims, they're subject to a four-year
7 limitation period that also starts with the date of
8 first sale, which again goes back to 1966. So,
9 therefore, these claims are untimely.

10 Now, as we have heard, the plaintiff characterizes
11 her strict liability count as actually a negligence
12 cause of action. Now, they actually have negligence
13 cause of action in their second amended complaint, their
14 Counts II, VII, IX and XIV. And to the extent they are
15 asserting strict liability claims, as we have shown,
16 they are time barred. And I know this brings up this
17 allegation of fraudulent concealment, but for that to
18 hold the day and if they are indeed still asserting
19 strict liability claims they have to show that there
20 were specific affirmative acts by the defendants in both
21 of them to prevent the plaintiff from discovering their
22 claims and that such acts did prevent the plaintiff from
23 discovering their claims. And the only evidence they
24 cite in their brief are to patents for cornstarch and

1 that there was advertisements for Johnson's baby powder.
2 These are not affirmative acts that can steal anything
3 from the plaintiff or deceive her. There is no evidence
4 in the record that Miss Driscoll relied on anything from
5 Johnson & Johnson -- the Johnson & Johnson defendants
6 had prevented her from discovering her claims. There's
7 nothing in the record that would allow the court to find
8 these strict liability claims -- if they are strict
9 liability claims -- to be tolled and asserted in this
10 case.

11 As to plaintiff's failure to warn claim, I want to
12 highlight the key evidence in law that disposes of this
13 claim. And first, the warning claims should be
14 dismissed based on plaintiff's own admission.
15 Plaintiff's warning claims are that the Johnson &
16 Johnson defendants failed to warn plaintiff of the
17 pertinent risk from talcum powder use that is ovarian
18 cancer, the disease she developed. But to show this,
19 the plaintiff must show that the Johnson & Johnson
20 defendants knew or should have known about this risk
21 from baby powder during the time of plaintiff's use.

22 As we said in our briefing, plaintiff allegedly
23 used Johnson's baby powder from 1966 to 1970. That's
24 based on the affidavit and testimony if Miss Carney as

1 far as her personality goes. There's no testimony in
2 this case from Miss Driscoll about any use of talcum
3 powder. And it's undisputed from plaintiff's evidence
4 that her own expert, Dr. Plunkett -- which the court
5 said she can testify -- is that there's no requirement
6 of a warning, in her opinion, with regard to ovarian
7 cancer until 1982 at the earliest. That's based on a
8 single study published at the time. And because
9 plaintiff's case is that warnings were not required
10 until years after the plaintiff last used baby powder,
11 her failure to warn claim must be dismissed.

12 Now, plaintiff's opposition to this key piece of
13 the timeline comes down to the testimony from Dr.
14 Plunkett about other alleged effects of talcum powder,
15 not ovarian cancer or any condition that Miss Driscoll
16 had, or not any cancer or harmful condition reported in
17 women using talc, but other alleged effects reported in
18 the literature and documents going back to before the
19 plaintiff's use. But the warning claims must fit the
20 claimed injuries. And this case is about ovarian
21 cancer. And that same expert, Dr. Plunkett, testified
22 unequivocally that such warnings were not required until
23 1982. And the case we would cite for that proposition
24 include the Wannall case and the McKinney case out of

1 Illinois.

2 And it's really key there's no authority that a
3 failure to warn claim can proceed based on what is
4 alleged that a defendant knew or should have known about
5 some other alleged condition that's not the alleged
6 injury in this case. Nothing plaintiff cites before or
7 during the time of use in this case shows a risk of
8 ovarian cancer from talc use. It's not just us saying
9 this. It's plaintiff's own expert saying it.

10 Again, Dr. Plunkett says that in the face of
11 everything that she references in her review of the
12 medical literature and everything she cites to,
13 including references to studies from the forties or
14 fifties and sixties, the risk of ovarian cancer was not
15 required to be warned about, according to her, until
16 1982. And this could not be more definitive for summary
17 judgment as to plaintiff's warning (Inaudible.)

18 And as to the preemption issue that the court
19 raised, there is no issue -- there can be no dispute
20 that the cosmetic FDA has regulatory authority over it.
21 Likewise, there's no dispute that the FDA in exercising
22 that regulatory authority expressly considered and
23 rejected the same warning claims the plaintiff is making
24 here in denying the two (Inaudible.) positions in 2014.

1 The state law claims, Seeking to require warnings would
2 be in conflict with FDA or preempt.

3 Now, plaintiff's opposition comes down to an effort
4 to compare what FDA did in 2014 to what FDA did in the
5 Reid case that's cited, Reid v. Johnson, but there could
6 be no dispute the FDA here made a final determination
7 that rejected ovarian cancer warnings. And the FDA set
8 out in detail its analysis and reasoning for its
9 (Distorted audio.)

10 Now, plaintiff challenges the preemptive effect of
11 this ruling by referring to evidence it claims showed
12 some kind of side discussion between Johnson & Johnson
13 and FDA. Now, this is disputed, but such a dispute does
14 not create a question of fact for trial. Application
15 for the preemption doctrine is a matter of law for the
16 court, and there is no part of that consideration that
17 involves the court getting into the inter-workings of
18 FDA. But in any event, nothing that plaintiff cites
19 shows that FDA's decision was based on anything but the
20 science.

21 Now, as to the civil conspiracy claims, as we note
22 in our briefing, civil conspiracy requires evidence of
23 an agreement that a third party committed a tortious
24 act. But none of the activities that plaintiff relies

1 on support a civil conspiracy cause of action. Things
2 like memberships in trade associations, exchanges in
3 drafting information, going to meetings, discussing
4 information on science and communicating with the
5 government. Because conspiracy claims are protected
6 activities under the First Amendment or not otherwise
7 actionable under Illinois law.

8 And this kind of claim can be made in every case
9 and nothing cited by plaintiff shows a conspiracy, but
10 what this claim is really about is an effort to open the
11 floodgates to a lot of irrelevant documents involving
12 nonparties. In particular those involving the talc
13 supplier, Imerys Talc America, who's now a party to the
14 case. The court should look at this claim and reject it
15 for what it is.

16 But we also move for summary judgment as to
17 plaintiff's negligent misrepresentation and breach of
18 express warranty claims. Plaintiff's opposition to
19 summary judgment did not respond to those motions.
20 There's no evidence to show reliance by the plaintiff
21 that an express warranty ever existed or that plaintiff
22 received any express warranty or any of the other
23 elements of these claims. So we would argue -- we would
24 ask the court to enter a summary judgment as to these

1 claims, as well.

2 And so for the reasons we set out in our briefing,
3 Your Honor, we ask the court to grant the Johnson &
4 Johnson defendants' summary judgment in this case.

5 THE COURT: Thank you. Is this going to be you
6 -- oh. Let me mute Mr. Hegarty. Is this going to be
7 you, Mr. Johnson?

8 MR. JOHNSON: It is, Your Honor.

9 THE COURT: Okay, please go ahead.

10 MR. JOHNSON: Thank you. First of all, with
11 respect to the failure to warn. Mr. Hegarty's comments
12 do not take into consideration the fact that the
13 operative complaint in front of the court now and in
14 front of the parties now is the second amended
15 complaint. His comments were based on a previous
16 version of the complaint. The complaint at issue is the
17 second amended complaint which goes back and recites
18 from Plunkett's report studies going back to the 1930s
19 showing the adverse health effects and the increased
20 risks of ovarian cancer on a timeline going from the
21 1930's. And I know Mr. Meadows can comment on this
22 momentarily, but I wanted to bring that to the court's
23 attention, the mistaken reference to the abandoned
24 complaint. We are now on the second amended complaint,

1 pages 9 through 12 of which have a timeline going from
2 the 1930's and in large part is based on Plunkett's
3 report in this case.

4 THE COURT: What's the date that that was
5 filed? I want to make sure the complaint I was looking
6 at this morning is the operative one.

7 MR. JOHNSON: I am not sure, Your Honor.

8 THE COURT: I can just pull that up and make
9 sure it says second amended.

10 MR. JOHNSON: I believe February 28th or so of
11 2020; February 28th of 2020, I believe.

12 THE COURT: Okay. You mean the -- the one I --
13 the second amended I show was filed March 13, 2020.

14 MR. JOHNSON: Okay, March 13th.

15 THE COURT: Got it.

16 MR. JOHNSON: And likewise, for the same
17 reasons, the second amended complaint makes different
18 allegations about the hazards, that is hazardous health
19 hazards, and the increased risk of ovarian cancer. And
20 it goes back to the 1930's. It doesn't stop at 1982 on
21 a peer reviewed study. It goes back much further in
22 time than that. And all the court need do is look at
23 the allegations in the second amended complaint,
24 Plunkett's report, to verify what I just said.

1 The warranty claims, again, we are alleging the
2 Fraudulent Concealment Statute, and we have again pled
3 in our second amended complaint pages from the page 8 to
4 page 12 page frame of conspiracy with the talc
5 manufacturer, Imerys Talc America, Inc., and we go on
6 for pages of allegations and, in addition, have
7 supplemented that with hundreds of pages of exhibits in
8 the record that we filed for these hearings about the
9 nature and extent of the conspiracy between the two
10 entities, Johnson & Johnson entities and Emerys. They
11 do not have a right, Your Honor -- they have a right to
12 petition the government, they have a right to petition
13 regulatory agencies, but they do not have a right -- as
14 we have alleged and have evidence to support --
15 providing disinformation, misinformation to the
16 consuming public, including Elizabeth Driscoll, about
17 the adverse health hazards and increased risks of
18 obtaining ovarian cancer from perineal genital use of
19 Johnson's baby powder. Political speech does not go
20 that far, to say the least, Your Honor. At the very
21 least, there are substantial, and I mean substantial
22 questions of fact at this point of the record at this
23 point here today on April 20th, certainly enough
24 questions of fact and issues to decide at a trial

1 subject to cross examines to deny their motion now.

2 I'm jumping around a lot. The civil conspiracy --
3 the civil conspiracy again is alleged in good faith in
4 the second amended complaint and it is again the
5 combination with the Johnson & Johnson entities and
6 Imerys Health America, Inc. joining up with this task
7 force which Your Honor has read about in the briefing,
8 can read about in the second amended complaint
9 allegations and the records we have filed for this
10 hearing to find out the depth to which the
11 conspiratorial actors went to suppress meaningful
12 information to the healthcare industry and, more
13 importantly, to the consuming public about the adverse
14 health hazards associated with talc use generally and
15 the increased risk of ovarian cancer for perineal
16 genital use in particular.

17 The express warranty and implied warranty, I think
18 Your Honor made the comment well taken earlier in your
19 introductory comments based on your notes, and that is I
20 think the evidence of reliance is the continued use, the
21 continued purchasing over time.

22 And again, in the second amended complaint we
23 alleged with specificity in quotation marks the extent
24 of the advertising clichets that were used for the

1 advertising for Johnson & Johnson's baby powder for
2 decades.

3 And Your Honor, I can't tell you -- when we
4 represent ladies in the MDL process in talcum powder
5 litigation I can't tell you how many people tell me on
6 the phone, Mr. Johnson, we've relied -- you know,
7 generations of our family have relied on these
8 representations, these advertisements, we grew up with
9 Johnson's baby powder, we grew up with these it's safe
10 and it -- you know, it's for use for hygienic purposes
11 for the babies, so on and so forth.

12 The purchasing and continued use and the total
13 suppression of information supports at least the chance
14 to plead and prove at trial the conspiratorial nature of
15 this combination with the J&J entities and Imerys Talc
16 America, Inc.

17 And for the same reason, the express and implied
18 warranty counts survive at this point in time, Your
19 Honor. We have plead fraudulent concealment for reasons
20 stated in the second amended complaint and in the
21 briefing and in the records presented in the court.
22 We've presented enough evidence to at least be able to
23 have the ability at trial to plead and prove the
24 warranty, both express and implied counts.

1 Reference was made to the preemption. Your Honor,
2 preemption does not take away the failure to warn claims
3 here. Again, a non-binding, not of record FDA letter
4 not approving the specific warning requested by the
5 applicants in that letter, does not make a nationwide
6 preemption doctrine, nor one for this court. The
7 failure to warn claims survive. The failure to warn
8 claims thrive here because there is -- well, we have had
9 the discussion about strict liability versus negligence.
10 Whatever we decide to do there, we still are entitled
11 to, with all respect, prove at trial the failure to warn
12 on behalf of Miss Driscoll that contributed to cause,
13 was a substantial cause in her ovarian cancer diagnosis
14 and her subsequent death.

15 That's it, Your Honor.

16 THE COURT: Last word, Mr. Hegarty? Hold on.
17 Hold on. Okay, last word, Mr. Hegarty.

18 MR. HEGARTY: Sure. Thank you, Your Honor,
19 again. Mr. Johnson made a reference to my mistaken
20 reference to an earlier complaint that's not true. My
21 argument and our argument is based on the second amended
22 complaint. And I will refer the court to the
23 allegations in that second amended complaint as they
24 relate to the failure to warn claim. The studies that

1 are referenced in that -- that part of the complaint in
2 no way demonstrate a risk of ovarian cancer, nor do they
3 allege a risk of ovarian cancer from talcum powder use.
4 They concern other alleged hazards. They concern
5 hazards from asbestos exposure. But none of those
6 studies before the time period that Miss Driscoll
7 allegedly last used talcum powder report on, or
8 reference, or make -- or comment on a risk of ovarian
9 cancer from talcum powder use. And this is clear from
10 Dr. Plunkett's testimony. It is unequivocal. She's
11 testified multiple times that a warning for ovarian
12 cancer, in her opinion, was not required until 1982 at
13 the earliest. And that's an opinion that includes all
14 of this science that's referenced in the second amended
15 complaint. So she looked at all of that science and
16 said still no warning about a risk of ovarian cancer was
17 required until 1982, years after plaintiff's evidence
18 shows that Miss Driscoll last used baby powder.

19 As it relates to the warranty claims, it's
20 undisputed that they are time barred. The same with the
21 strict liability claims. There's no factual grounds
22 here for the court to find a tolling as it relates to
23 those claims. Plaintiff still has their negligence
24 claims that they can proceed upon if the court denies

1 the motion for summary judgment.

2 Civil conspiracy claim, I invite the court to read
3 the evidence. The evidence that's cited does not
4 support a civil conspiracy claim under Illinois law.
5 None of the acts allege the activities that the record
6 that they present shows amounts to a civil conspiracy.
7 What this is, Your Honor, is an effort to try to
8 introduce a bunch of documents that they contend come in
9 because of the count of civil conspiracy, which they
10 don't show civil conspiracy and in the end they dismiss
11 the civil conspiracy count, which is what's been
12 happening in these cases. This is just a claim that's
13 used to try to get documents into evidence of third
14 parties that should not come into evidence.

15 Express warranty, Your Honor, there is no -- I
16 invite the plaintiff to show us an express warranty
17 given to Miss Driscoll. There is no express warranty in
18 this case and there's certainly no showing of reliance.
19 And I don't think the case law supports any implied
20 showing of reliance, and certainly not as to an express
21 warranty that doesn't exist.

22 So, as to all these claims that in the end will
23 just drop out if this case goes to trial, we ask the
24 court to do some housekeeping right now and narrow this

1 case to what it should be if this case does go to trial
2 on July 12th. Thank you.

3 THE COURT: No, thank you. And thank all the
4 parties again and for your patience. And thank you for
5 not going until 7:00 tonight.

6 After reviewing the pleadings and the arguments of
7 counsel, the court finds there's enough evidence to go
8 to trial or to give to a jury at this point in time on
9 these counts.

10 The motion for summary judgment is denied at this
11 time. And I'll see you all on the first. Is that
12 right?

13 MR. HEGARTY: Yes, Your Honor.

14 THE WITNESS: Thank you. Take care.

15 (End of proceedings.)

16 *****

17

18

19

20

21

22

23

24

1 STATE OF ILLINOIS)
2 TWENTIETH JUDICIAL CIRCUIT) SS.
3 COUNTY OF ST. CLAIR)
4
5
6

7 I, MARY JO JALINSKY, CSR No. 084-003202, one of
8 the Official Court Reporters in and for the Twentieth
9 Judicial Circuit, St. Clair County, Illinois, do hereby
10 certify that I reported in shorthand the proceedings had
11 in the above-entitled cause; that I thereafter caused
12 the foregoing to be transcribed into typewriting, which
13 I certify to be a true and accurate transcript of the
14 proceedings.

15

16

17

18


MARY JO JALINSKY, C.S.R.
Official Court Reporter

19

20 Dated this 28th day
of April, 2021.

21

22

23

24